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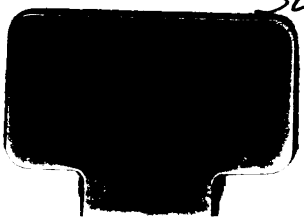

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TRIAL

OF

THOMAS O. SELFRIDGE,

COUNSELLOR AT LAW,

BEFORE THE HON. ISAAC PARKER, ESQUIRE.

FOR KILLING

CHARLES AUSTIN,

ON THE PUBLIC EXCHANGE, IN *BOSTON,*

AUGUST 4th, 1806.

.....

TAKEN IN SHORT HAND,

BY T. LLOYD, ESQ. REPORTER OF THE DEBATES OF CONGRESS, AND GEO. CAINES, ESQ. LATE REPORTER TO THE STATE OF NEW-YORK.

AND SANCTIONED

BY THE COURT, AND REPORTER TO THE STATE.

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BE IT REMEMBERED, that on the twenty-sixth day of January, in the thirty-first year of the Independence of the United States of America, RUSSELL & CUTLER, BELCHER & ARMSTRONG, OLIVER & MUNROE, and WILLIAM BLAGROVE, of the said District, have deposited in this Office the Title of a Book, the Right whereof they claim as *Proprietors*, in the words following, *to wit :*

"Trial of THOMAS O. SELFRIDGE, Attorney at Law, before the Hon. ISAAC PARKER, Esq. for killing CHARLES AUSTIN, on the Public Exchange, in Boston, August 4th, 1806 ; taken in short hand, by *T. Lloyd*, Esq. Reporter of the Debates of Congress, and *Geo. Caines*, Esq. late Reporter to the State of New-York, and sanctioned by the Court, and Reporter to the State."

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WILLIAM S. SHAW,
Clerk of the District of Massachusetts.

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ADVERTISEMENT.

THE Publishers have spared no labour or expense, to obtain an authentic and accurate Report of this Trial.—The evidence, being originally taken by two eminent Stenographers, has been compared by Mr. TYNG, Reporter of the Decisions of the Supreme Judicial Court, with the Notes of the Testimony taken by him, and with the Minutes of the Hon. Judge, who sat in the Trial. The several Addresses have been submitted to, and corrected by the respective Speakers.

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REPORT, &c.

THE Court was opened on Tuesday the 25th day of November, present*

The Hon THEOPHILUS PARSONS, L. L. D. Chief Justice.
The Hon. THEODORE SEDGWICK, L. L. D.
The Hon. SAMUEL SEWALL,
The Hon. ISAAC PARKER,
} Justices.

The Grand Jury being impannelled and sworn, viz.

Thomas Handasyd Perkins, Esquire, Foreman.

Samuel Emmons, George Paine, Daniel Tuttle, Joshua Davis, Jedidiah Parker, David Townsend, Jonathan Kelton, Moses Gardner, Joseph Francis, Mitchell Lincoln, Samuel Sturgis, Charles Vose, Stephen Gore, Gamaliel Bradford, William Harris, William M'Neil Watts, Daniel Dennison Rogers, William Walter, William Shimmin, all of *Boston*, and *Caleb Pratt* of *Chelsea*, the Chief Justice delivered a learned and impressive charge, from which the following extract, as having more immediate relation to the subject of this Report, is copied by permission.

——" Felony affecting life is either murder, or manslaughter. Murder is the wilful killing any person of malice aforethought, either expressed or implied.

The malice is express, when there was a premeditated intention to kill. Malice is implied, when the killing is attended with circumstances which indicate great wickedness and depravity of disposition, a heart void of social duty, and fatally bent on mischief.

Formerly if the husband was maliciously killed by his wife, or the master by his servant, the offence was adjudged to be petit

* It was understood that suggestions had been received from the Attorney General, that he had some legal objections to the return of the Jurors from Boston, upon which it was desirable to have the opinion of the full Court; and that these suggestions were the occasion of the presence of the other members of the Court besides Judge PARKER, to whom this session had been assigned. The objections being considered and overruled by the Court, but one Judge sat in the trials after the first day, except in the trial of one indictment for murder.

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treason; but by virtue of a late Statute it is now considered only as murder, and as such is indicted and prosecuted.

And every man who kills another in a duel deliberately fought, is a murderer.

Manslaughter is the killing another, either wilfully, or through gross negligence, but not from malice aforethought.

Homicide from accident is excusable—from necessity it is either excusable, or justifiable—when for the advancement, or in execution of public justice, it is justifiable.

Observing in the list of prisoners, returned by the Gaol-keeper, that two persons are in custody charged with felonious homicide, it may be useful to you, in your enquiries, to mention some principles of law, relating to this subject.

In every charge of murder, the fact of killing being first proved against the party charged, to reduce the offence below that crime, by any circumstances of accident, necessity, or human infirmity, he must satisfactorily prove these circumstances, unless they arise out of the evidence produced against him.

When the act which occasions the death is unlawful, yet if malice either express, or implied, be wanting, the killing is not murder, but manslaughter, the act being imputed to the infirmity of human nature.

Neither words of reproach, however grievous, nor contemptuous or insulting gestures, without an assault on the person, are sufficient to free the party killing with a dangerous weapon, from the guilt of murder.

An assault is any attempt or offer, with force and violence, to do a corporal hurt to another, as by striking at him, or even by holding up the fist at him in a threatening or insulting manner, or with such other circumstances as denote an intention and ability, at the time, of using actual violence against his person. And when the injury, however small, as spitting in a man's face, or unlawfully touching him in anger, is inflicted, it amounts to a battery, which includes an assault.

Any assault made, not lightly, but with violence, or with circumstances of indignity, upon a man's person, if it be resented immediately, and in the heat of blood, by killing the party with a deadly weapon, is a provocation, which will reduce the crime to manslaughter; unless the assault was sought for by the party killing, and induced by his own act, to afford him a pretence for wreaking his malice. To illustrate this exception, a case is stated of the falling out of A and B. A says, he will not strike, but will give B a pot of ale to touch him; on which B strikes A, who thereupon kills B. This is murder in A, notwithstanding the provocation received by the blow from B, because A sought that provocation.

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A man may repel force by force, in defence of his person, against any one who manifestly intends, or endeavours by violence, or surprise, feloniously to kill him. And he is not obliged to retreat, but may pursue his adversary, until he has secured himself from all danger; and if he kill him in so doing, it is *justifiable self-defence*. But a bare fear, however well grounded, unaccompanied by any open act, indicative of such an intention, will not warrant him in killing. There must be an actual danger at the time. And, (in the language of Lord Chief Justice Hale,) it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, &c. that his life was in imminent danger; otherwise the killing of the assailant will not be *justifiable homicide*.

But, if the party killing had reasonable grounds for believing, that the person slain had a felonious design against him, and under that supposition kill him; although it should afterwards appear, that there was no such design, it will not be murder; but it will be either manslaughter, or *excusable homicide*, according to the degree of caution used, and the probable grounds of such belief.

These principles have been recognised by the wisest and most humane writers on criminal law.

After a due and impartial enquiry into the several cases, that may require your attention, you will ascertain the facts, and afterwards apply the principles of law, to obtain a just and legal result."

On Tuesday, December 2d, the Grand Jury returned into Court, and, among other bills, presented the following indictment against *Thomas Oliver Selfridge*, Esquire :—

Commonwealth of Massachusetts.

Suffolk, and Nantucket, ss. } *At the Supreme Judicial Court begun and holden at Boston within the County of Suffolk, and for the Counties of Suffolk and Nantucket, on the fourth Tuesday of November, in the year of our Lord one thousand eight hundred and six.*

The Jurors for the Commonwealth of *Massachusetts* upon their oath present, that *Thomas Oliver Selfridge*, of *Boston*, in the county of *Suffolk*, gentleman, otherwise called *Thomas Oliver Selfridge* of *Medford*, in the county of *Middlesex*, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fourth day of August in the present year, with force and arms, at *Boston* aforesaid, in the county of *Suffolk* aforesaid, in and upon one *Charles Austin*, in the peace of God and the said Commonwealth, then and there being, feloniously, wilfully, and of the fury of his mind, did make an assault; and that he the said *Thomas Oliver Selfridge*, a certain pistol of the value of five dollars, then and there loaded and charged with gun powder and one leaden bullet; which pistol he the said *Thomas*

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Oliver Selfridge, in his right hand, then and there held, to, against and upon the said *Charles Austin*, then and there, feloniously, wilfully, and of the fury of his mind, did shoot and discharge; and that he the said *Thomas Oliver Selfridge*, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder, shot and sent forth as aforesaid, the aforesaid *Charles Austin*, in and upon the left breast of him the said *Charles Austin*, a little below the left pap of him the said *Charles Austin*, then and there, with the leaden bullet aforesaid, out of the pistol aforesaid, by him the said *Thomas Oliver Selfridge*, so as aforesaid, shot, discharged and sent forth, feloniously, wilfully, and of the fury of his mind, did strike, penetrate and wound, giving to him the said *Charles Austin*, then and there, with the leaden bullet aforesaid, shot, discharged and sent forth out of the pistol aforesaid, by him the said *Thomas Oliver Selfridge*, in manner aforesaid, in and upon the left breast of him the said *Charles Austin*, a little below the left pap of him the said *Charles Austin*, one mortal wound of the depth of six inches, and of the breadth of one inch, of which mortal wound aforesaid the said *Charles Austin* then and there instantly died; and so the Jurors aforesaid, upon their oath aforesaid, do say, that he the said *Thomas Oliver Selfridge*, the said *Charles Austin*, then and there, in manner and form aforesaid, feloniously, wilfully, and of the fury of his mind, did kill and slay, against the peace of the Commonwealth aforesaid, and the law in such case made and provided.

A true bill.

T. HANDASYD PERKINS, *Foreman.*

JAMES SULLIVAN, *Attorney General.*

The Defendant, being soon after brought into Court and arraigned upon the foregoing indictment, pleaded *Not Guilty*. Being enquired of by the Court* at what time he would be ready for his trial, he prayed for a postponement of it to some future day in the term. He stated that he could not at that time name the day, as he should have occasion to send to a considerable distance for witnesses, whom he believed essential to his defence, of whom he had understood that one was in the District of Maine, and another in the state of New York.

On the motion of his Council that he might be admitted to bail, which was not opposed by the Council for the government, he was ordered to recognize himself, in two thousand dollars, with sufficient surety or sureties in the same sum for his appearance *de die*, *in diem* during the present term, &c.

On Tuesday, the 23d day of December, which had been previously assigned by the Court, the trial commenced before the Hon. Mr. Justice PARKER.

* The Hon. Judge SEDGWICK was then sitting in the place of Judge PARKER.

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At nine o'clock the Court opened. The Clerk then proceeded to call the Jury in the following order:

1. Paul Revere—sworn.

Thomas Fracker.

Mr. Selfridge. I wish to enquire if Mr. Fracker has not formed an opinion on this occasion.

Mr. Fracker being sworn to answer, was asked by

Parker J. Have you heard any thing of this case, so as to have made up your mind?

Ans. No.

Parker J. Do you feel any bias or prejudice for or against the prisoner at the bar?

Ans. No.

Parker J. Swear him.

2. Thomas Fracker—sworn.
3. Isaac Parker—sworn.
4. Micajah Clark—sworn.

Ward Jackson.

Mr. Selfridge. I wish Mr. Jackson to say whether he has not some bias in this case.

Mr. Jackson being sworn to answer, was asked by

Parker J. Have you formed any opinion as to the issue of this cause?

Ans. No.

Parker J. Do you feel any bias or prejudice for or against *Mr. Selfridge?*

Ans. None.

Parker J. Swear him.

5. Ward Jackson—sworn.

Henry Sargent.

Mr. Selfridge I object to him as having been one of the Jury of Inquest.

6. Francis Tufts.
7. Lemuel Gardner.
8. Elisha Learned.
9. Ebenezer Goffe.
10. John Fox.
11. John West.
12. Dexter Dana.

} SWORN.

For the Commonwealth, James Sullivan, Attorney General, and Daniel Davis, Solicitor General,

For the Defendant, Christopher Gore and Samuel Dexter.

Clerk of the Court. Gentlemen of the Jury hearken to the Indictment found against *Thomas Oliver Selfridge.*

[Here the Clerk read the indictment, see page 7.]

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Clerk of the Court. To this Indictment the defendant has pleaded not guilty, and has put himself on the country, which country you are, and you are now sworn to try the issue.

Mr. SOLICITOR GENERAL.

May it please your Honor, and you, Gentlemen of the Jury.

You perceive by the indictment that has been read to you, that Thomas Oliver Selfridge is charged by the Grand Jury of the body of this county, with the crime of manslaughter. The indictment particularly states that on the fourth day of August, in the present year, he discharged a loaded pistol at Charles Austin, in consequence of which he instantly died. This fact is alleged, in the indictment, to have been committed feloniously, wilfully, and in the fury of the mind of the defendant; and this is the appropriate description of the crime of manslaughter.

It is not my duty, on this occasion, to pourtray the consequences that have resulted from the shocking event, which has brought Mr. Selfridge to the bar of his country. It is my more immediate and appropriate duty to explain the nature of the crime, and apply the facts which will be proved to you by the witnesses on the part of Government; I shall then adduce the authorities and cases in the books which are applicable to the present issue. It is impossible for me to discharge this duty with any satisfaction to myself, or any assistance to you, without recurring to the authorities, which treat on the subject of homicide. You will find by a recurrence to those authorities, that it will be impossible to understand them without attending to the subject of homicide at large. It will also be impossible to understand the crime of manslaughter, without a previous acquaintance with the crime of murder. Writers have so blended the different degrees of guilt attached to these crimes, and the shades are in many instances so faintly delineated between them, that it is difficult to be acquainted with the distinction, which it is your duty to make before you can understand and decide on the present case. Therefore I will, before I state the facts and call the witnesses to prove these facts, ask your attention for a few minutes to several passages that will be referred to, merely with a view to define the crime, and which you ought, in the beginning of the cause, to understand. I shall for your convenience and my own, trouble you no further than to read those authorities which contain the general definition; and then will state the facts which are to be proved by the witnesses that will be adduced, and then read certain rules of law which apply to this case in particular, and having done that, I shall have done all that the Government will require of me on the present occasion.

I have not been able to find, by attention to the several treatises on the subject of homicide, any book that contains a better gener-

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al description of the crime of manslaughter, than the 4th volume of Blackstone's Commentaries, in which the subject of homicide is treated at large. But at this time I shall ask your attention to those parts only which treat of the crime of which the defendant stands accused. In 4 Blackstone's Com. p. 177, that learned author says: "Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great CREATOR; and of which therefore no man can be entitled to deprive himself, or another, but in some manner, either expressly commanded in, or evidently deducible from, those laws which the CREATOR has given us; the divine laws, I mean, of either nature or revelation." The author then proceeds to state what would be justifiable homicide; but as nothing can occur in the present trial, which can render the homicide of that nature, it will be unnecessary to read it.

In pages 180 and 181, he proceeds, in the next place, to consider such homicide as takes place to prevent a crime.

"The Roman law," he says, "also justifies homicide, when committed in defence of the chastity either of one's self or relations; and so also, according to Selden, stood the law in the Jewish republic. The English law justifies a woman, killing one who attempts to ravish her; and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds, "that all manner of force, without right, upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.

In page 183, the author considers that species which consists in self-defence.

"Homicide in *self-defence* or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by

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killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or rather (as some choose to write it) *chaud-medley*; the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion: both of them are pretty much of the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. viii. c 5. and our antient books, that it is properly applied to such killing, as happens in self-defence upon a sudden rencounter. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law.—Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant."

In page 188, the learned writer describes the nature of felonious homicide:

"Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done, either by killing one's self, or another man."

I will thank you, gentlemen of the jury, to attend to the distinction between that offence, and the one for which the defendant stands indicted, and which I am about to state from the same elegant author.

In page 191, he says:

"Manslaughter is therefore thus defined, the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act."

"As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter; and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion; and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter."

There is only one other definition, which I will trouble you, Gentlemen, to attend to in the opening of this trial; it is the definition of the crime of murder, as given in the 195th page of the same book, in the words of Sir Edward Coke.

"Murder is therefore now thus defined, or rather described, by Sir Edward Coke. "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied."

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it is murder. He then goes on to give different deſcriptions of the ſeveral branches of murder, which it is not neceſſary in this ſtate of the trial to trouble you with.

I thought it my duty, Gentlemen, to read to you ſuch paſſages in the book I have reſorted to on this occaſion, as contained a general deſcription of all the different branches of homicide, from wilful murder down to juſtifiable ſelf defence.

I will now ſtate my reaſons for ſo doing. So far as I am acquainted with the facts of this caſe, it will turn out, from the teſtimony of the witneſſes on the part of the Government, that this event happened in ſuch a manner, that it may become a queſtion whether the Defendant has been guilty of murder or manſlaughter.

I do not mean to inſinuate, that it is poſſible to convict the Defendant on this indictment of a higher ſpecies of homicide than manſlaughter; but you will find by a recurrence to other books, and on an inveſtigation of the facts, that though he be indicted for manſlaughter, if from thoſe facts he might have been found guilty of murder, he muſt be found guilty of manſlaughter.

I mention this, becauſe, poſſibly, it may be contended, that the facts amount either to murder, or excuſable ſelf defence, and that in either caſe you muſt acquit. I ſay it is poſſible, becauſe it is out of my power to anticipate on what ground the Defendant's Counſel will place their defence. It is therefore neceſſary that you ſhould have a juſt idea of the nature of theſe different ſpecies of homicide; for though you find that the facts approach the degree of murder, you muſt from every principle of public juſtice ſay, that the Defendant is guilty of manſlaughter only.

I will now ſtate to you generally, the facts which will appear in evidence to you on the part of the Government, and before I proceed particularly to ſtate thoſe facts, I will mention that it is neceſſary that the Government prove theſe two things; firſt, that Charles Auſtin, the perſon named in the indictment, is dead; ſecondly, that he came to his death by the inſtrumentality of the Defendant at the bar, and under the circumſtances alleged in the indictment; which two facts will amount to the crime of manſlaughter. Theſe then are the facts which the Government muſt prove before it can be entitled to your verdict; and you are to judge from the evidence that will be laid before you, whether theſe two points are or are not ſubſtantiated on the part of the Commonwealth.

I expect that it will appear, that on the day mentioned in the Indictment, between the hours of one and two o'clock in the afternoon, Selfridge was in his office, employed about his ordinary buſineſs; that a few minutes before he proceeded from thence into

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State ſtreet, he had a converſation, in which he mentioned that he anticipated ſome attack in the courſe of the day, (probably about 'Change hours) and that he then ſtated a converſation which took place between Mr. Benjamin Auſtin and Mr. Welſh, in which Mr. Auſtin had threatened to have him chaſtiſed; that Mr. Selfridge declared to the perſon with whom he had that converſation, that he was not a man to engage at fiſticuffs, though he was prepared to protect and defend himſelf; to this, will be added other circumſtances which tend to ſhow, that Mr. Selfridge went out of his office with the piſtol, which was the inſtrument of the death of the deceaſed, and which was deliberately loaded for that purpoſe. About twenty minutes after Mr. Selfridge went out of his office, down into State ſtreet, and the deceaſed was then on 'Change, ſtanding near the door of Mr. Townſend's ſhop; that Mr. Selfridge walked down State ſtreet, with his hands in his pockets, or behind him, with, probably, an intent to conceal the inſtrument he had in his pocket, and with which he gave the deceaſed his death wound; that in paſſing down in this manner, Auſtin leaving the place at which he ſtood, approached him with a ſtick in his hand; that they met together a few paces from the door of the ſhop, and that there a combat enſued. It will appear that the deceaſed came with a ſtick in his hand, in a manner to make an aſſault; but from the evidence we ſhall introduce, it will be impoſſible, I think, to decide, whether the piſtol was diſcharged, and the death wound given, before, or after Auſtin gave Selfridge a blow.

It is not neceſſary now ſo very minutely to ſtate the circumſtances of this affecting tragedy; I ſhall rely on the information of the witneſſes for theſe facts, but it will appear from the whole, that it was performed in the courſe of twenty ſeconds at the fartheſt; the parties met, the piſtol and firſt blow given and diſcharged, probably, at the ſame inſtant. Auſtin then fell to the ground, and ſoon expired; he was carried into the ſhop of Mr. Townſend, where his wound was examined, found mortal, and of which he died.

When the people collected, Mr. Selfridge appeared perfectly in poſſeſſion of his mind; declared himſelf in a ſtate of recollection, and ſaid, he knew what he had done, and was ready to anſwer for it at the bar of his country.

Theſe are the outlines of this caſe; theſe facts, I am confident, from what I know of the former teſtimony of the witneſſes, they will again declare, and, perhaps, ſomething further in favour of the Government. If ſo, it will be impoſſible the Defendant ſhould eſcape the puniſhment the law affixes to the crime. Taking it for granted that I ſhall prove the facts, it may be convenient at this time to aſk your attention to thoſe rules of law applicable to a caſe of this kind.

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When I have ſo done, their applicability will eaſily be perceived, and the cauſe will be fully opened on the part of the Government.

I do not know that the book I have in my hands, has ever been read as an authority. It is 1 Eaſt's Pleas of the Crown, which contains the beſt treatiſe on the ſubject of homicide, that has been printed.

I will begin, by reading ſome part of the 19th ſec. chap. 5, page 232. If any queſtion is made as to the correctneſs of the principles, I have *Hale*, *Hawkins*, and the other authorities cited, which can be referred to.

Parker J. There are few authorities in that book, that are not taken from Hale and Hawkins.

Sol. Gen. The part I cite, is that which treats of homicide from tranſport of paſſion, or heat of blood.

" Herein is to be conſidered under what circumſtances it may be preſumed that the act done, though intentional of death, or great bodily harm, was not the reſult of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone. Upon this head it is principally to be obſerved, that whenever death enſues from ſudden tranſport of paſſion, or heat of blood, if upon a reaſonable provocation and without malice, or if upon ſudden combat, it will be manſlaughter; if without ſuch provocation, or the blood has reaſonable time or opportunity to cool, or there be evidence of expreſs malice, it will be murder. For let it be again obſerved, that in no inſtance can the party killing, alleviate his caſe, by referring to a previous provocation, if it appear by any means, that he acted upon expreſs malice."

I ſhall now read part of the 21ſt ſec. of the ſame chapter:

" It muſt not however be underſtood that any trivial provocation, which in point of law amounts to an aſſault, or even a blow, will of courſe reduce the crime of the party killing to manſlaughter. This I know has been ſuppoſed by ſome, but there is no authority for it in the law. For where the puniſhment inflicted for a ſlight tranſgreſſion of any ſort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be conſidered as the effect of a brutal and a diabolical malignity, than of human frailty; it is one of the true ſymptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithſtanding ſuch provocation. *Barbarity*, ſays Lord Holt, in Keate's caſe, will often make malice."

I will now read another rule from the 23d ſec. page 239:

" In no caſe, however, will the plea of provocation avail the party, if it were ſought for and induced by his own act, in order to afford him a pretence for wreaking his malice. As, where A. and B. having fallen out, A. ſays he will not ſtrike, but will give B. a pot of ale to touch him; on which B. ſtrikes A. and A. kills him: this is murder. And in all caſes of provocation, in order to extenuate the offence, it muſt appear that the party killing acted upon ſuch provocation, and not upon an old grudge; for then it would amount to murder.

Gore. The gentleman has ſtated and laid down principles

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which I ſhall oppoſe; and I may as well take the opinion of the Court now, as at any time hereafter. The gentleman has ſaid that on this Indictment he ſhall offer evidence to ſhew, that there was that ſort of malice, which is deſcribed in the crime of murder. He has ſtated that by entering into the converſation and antecedent circumſtances, he will be able to prove there was a previous malice, and that thoſe circumſtances and malice, amount to the crime of murder; now the Indictment being for manſlaughter, negatives all idea of malice; he therefore can give no teſtimony on the ground of malice, as it does not comport with crimes ſtated in the Indictment. It is confounding all rules of law, if under this Indictment for manſlaughter, he ſhould attempt to ſet up a proof of malice; to this point, I quote Hawkins. Book 1. chap. 30.

"Homicide againſt the life of another amounting to felony is either with or without malice. That which is without malice," I am reading now from the firſt ſection, "is called manſlaughter, or ſometimes chance medley, by which we underſtand ſuch killing as happens either on a ſudden quarrel, or in the commiſſion of an unlawful act, without any deliberate intention of doing any miſchief at all;" and in the ſecond ſection he goes on to ſtate, "and from hence it follows, that there can be no acceſſaries to this offence before the fact, becauſe it muſt be done without premeditation."

Here is an exact definition of the crime of murder, corroborated by other definitions in the Books cited in the margin, which perfectly excludes all idea of malice. Therefore they cannot, under this Indictment, attempt, according to any rule of law (that I know of,) to prove malice in my Client, for it would make a diſtinct crime, different from that with which the Defendant is charged.

Sol. Gen. I had no inducement to make this ſtatement to the Jury, or to intimate the nature of the evidence I ſhould offer, but that of doing what I apprehend to be my duty. I ſtated that it was impoſſible for me to anticipate on what grounds the defence would be placed; but if it ſhould turn out that the Defendant is not guilty of the crime of manſlaughter, according to the technical definition of that crime, becauſe the evidence may ſhow that it was either murder, or may tend to prove it juſtifiable ſelf defence; in the firſt caſe, it is clearly law, that if, on an Indictment for manſlaughter, the evidence ſhould ſhew the crime was murder with malice, the Jury would be juſtifiable in convicting him at leaſt of manſlaughter. The reaſon upon which I bottom this opinion is, that they being judges of the facts, and of the law as it applies to thoſe facts, they are competent to the deciſion, and they will find themſelves warranted in ſo doing by the opinion Judge Holt delivered in Mawgridge's caſe, reported by Kelyng, page 125. The principle I lay down, was then recognized, and on the authority of that caſe, I ground myſelf on the preſent occaſion. Holt then, after ſpeaking of homicide or manſlaughter, ſays,

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"The killing of a man by assault of malice prepense, hath been allowed to be murder, and to comprehend the other two instances."

Parker J. I see no reason to doubt that principle. If the evidence proves the Defendant guilty of a higher crime than that with which he stands indicted: for example, if they prove him guilty of murder, it is competent to the jury, to find him guilty of manslaughter, for which he is indicted.

Att. Gen. The books are so full on this point, that it is unnecessary to trouble the Court with the recital of them.

Dexter. I wish to know what is precisely the question, and to what point it is necessary to turn our attention. If it be true, that the whole question before the Court and Jury, is whether the same evidence can be given on a trial for manslaughter as on an indictment for murder, and it be decided that it can, it appears to follow that the cause is to be tried on principles on which there can be no legal decision; if we are to try on the present occasion for murder, the Jury cannot convict nor acquit. It seems to me clear law that no case can be decided, but that which is in issue.

The Indictment is for manslaughter; the definition of this crime is that it must be committed on a sudden, without malice. If malice aforethought be proved, then no part of the definition is substantiated. We cannot have come here to defend what we are not charged with. We have no objection to go into every fact anterior, but we ought to have had an opportunity to know of this, and of what was intended by the prosecution, and further we ought to have known of it legally, that is by the Indictment. The Defendant is not prepared to meet suggestions of malice. We are not willing to exclude any facts, but the truth is, that not expecting a charge of this kind, the Defendant is not completely prepared; we do not wish to escape from the offence, if it be one; but it ought to have been described with technical precision. We insist that it has not. The authorities exclude malice and premeditation, and we cannot be prepared to meet them, nor is it competent for the Government to shew them, nor is it incumbent on us to prove that they were not in existence.

Parker J. There is no definite motion before the Court; the observations now made, arise from what the Solicitor General expected to be able to prove. I understand, that he expected to show a previous preparation, and that what was done by the Defendant was not to protect himself from attack. Whether the offence was manslaughter or excusable homicide, depends perhaps on the instrument that was employed, the opportunity to conceal it, whether he carried it before him, or whether he took up a stick in the street to defend himself. The object of the Solicitor General was to shew whether it was merely in defence of himself, or whether there was any previous malice; it appeared to me proper to go into evidence to that effect.

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Attorney General. There are ſeveral authorities to ſhow that this may be done.

Dexter. There is but one, and that is from an opinion of Holt's.

Parker J. I ſtate this, that if from the evidence admitted, and laid before the Jury, they ſhould be of opinion that the crime was of a higher nature, the ſame facts would prove manſlaughter was committed. I believe there can be no doubt of this.

Dexter. We do not hold as law, that if the facts come out to prove this offence to be an higher crime than manſlaughter, the Jury are to acquit.

Att. Gen. If by excluding evidence that would ſhow a previous deſign, they can get rid of this Indictment, it would amount to ſaying, if it be proved that he was guilty of murder, he ſhall not be found guilty of manſlaughter.

Sol. Gen. I was reading to you, Gentlemen, a paſſage from the ſame authority which occupied your attention when I was interrupted; it was from Eaſt's Pleas of the Crown, ſect. 23, p. 239.

"And in all caſes of provocation, in order to extenuate the offence, it muſt appear that the party killing acted upon ſuch provocation, and not upon an old grudge; for then it would amount to murder."

And in the next ſect. 24, he proceeds,

"But there is another claſs of caſes, where the degree or ſpecies of provocation enters not ſo deeply into the merits of them as the foregoing; and thoſe are, where upon words of reproach, or, indeed, any other ſudden provocation, the parties come to blows, and a combat enſues no undue advantage being taken or ſought on either ſide: if death enſue, this amounts to manſlaughter."

The application of this rule will be to that part of the caſe, by which it will appear that the Defendant took an undue advantage, by being ſecretly armed; a fact, of which the deceaſed could have had no knowledge at the time. I ſhall therefore next read the latter part of ſection 30, from the ſame chapter, page 251.

"It has been ſhewn, that ſuch malice will be preſumed, even though the act be perpetrated recently after the provocation received, if the inſtrument or manner of retaliation be greatly inadequate to the offence given, and cruel, and dangerous in its nature; becauſe the law ſuppoſes that a party capable of acting in ſo outrageous a manner upon a ſlight provocation muſt have entertained at leaſt a general, if not a particular malice, and have before determined to inflict ſuch vengeance upon any pretence that offered."

I will now beg leave to ſtate part of ſection 44, of the ſame chapter, page 272.

"A man may repel force by force, in defence of his perſon, habitation, or property, againſt any one who manifeſtly intends or endeavours *by violence*, or *ſurpriſe*, to commit a *known felony*, ſuch as murder, rape, robbery, arſon, burglary, and the like, upon either. In theſe caſes he is not obliged to retreat, but may purſue his adverſary until he has ſecured himſelf from all danger; and if he kill him in ſo doing, it is called juſtifiable ſelf defence."

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The next authority, which I ſhall aſk your attention to, is in ſection 47, page 246.

"In another caſe, however, where the aſſault, though a very violent one, was plainly with a view to chaſten the party for his miſbehaviour, and there appeared no intent to aim at his life; his killing the aſſailant was holden not to be lawful or excuſable under the plea of ſelf defence. That was *Nailer's* caſe, tried before *Holt* C. J. *Tracy* J. and *Bury* B. The priſoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed: his father ordered him to go to bed, which he refuſed to do; whereupon a ſcuffle happened between the father and ſon. The deceaſed, who was then in bed, hearing the diſturbance, got up, threw the priſoner on the ground, and fell upon him, and beat him, the priſoner lying upon the ground, with his brother upon him, not being able to avoid his blows, or make any eſcape from his hands. And as they were ſtriving together, the priſoner gave his brother the mortal wound with a penknife. As a conference of all the Judges after Michaelmas Term, 1704, it was unanimouſly holden to be manſlaughter; for there did not appear to be any *inevitable neceſſity*, ſo as to excuſe the killing *in that manner*. The deceaſed did not appear to have aimed at the priſoner's life, but only to have intended to chaſtiſe him for his miſbehaviour to his father: and to excuſe homicide upon the ground of ſelf defence, there muſt always appear to have been ſuch a degree of neceſſity as may reaſonably be deemed inevitable. At the conference in the above caſe, *Powell*, J. put the caſe: If A. ſtrike B. *without any weapon*, and B. retreat to a wall, and then ſtab A. that will be manſlaughter; which *Holt*, C. J. ſaid was the ſame as the principal caſe: and that was not denied by any of the Judges. For it cannot be inferred from the bare act of ſtriking *without any dangerous weapon*, that the intent of the aggreſſor roſe ſo high as the death of the party ſtricken: and without there be a plain manifeſtation of a felonious intent, no aſſault, however violent, will juſtify *killing* the aſſailant under the plea of neceſſity."

And in the ſame ſection it is further laid down,

"In no caſe can a man juſtify the killing of another under the pretence of neceſſity, unleſs he were wholly without any fault imputable by law in bringing that neceſſity upon himſelf."

The next ſection I ſhall read is ſection 51, page 279. This ſection contains a rule and principle directly applicable to the preſent caſe, and the moſt important diſtinction you will have to take into conſideration in this trial. I therefore aſk your particular attention to it.

"It has been ſhewn that where death enſues from a combat on a ſudden quarrel, without prepenſe malice, ſuch act amounts but to manſlaughter; being attributed to heat of blood ariſing from human infirmity."

I preſume it will be impoſſible for the Defendant's Counſel to place his defence on ſtronger grounds than the one in this rule. Now the authority proceeds, that in this neceſſity, which you will probably find to be the preciſe caſe of the Defendant.

"In order to reduce ſuch offence from manſlaughter to ſelf defence upon chance medley, it is incumbent on the Defendant to prove two things; 1ſt, that before a mortal ſtroke given he had declined any further combat, and had re-

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treated as far as he could with ſafety; 2d, that he then killed his adverſary through mere neceſſity, in order to avoid immediate death."

And here you obſerve it will be a fact of inquiry whether the Defendant declined the combat and retreated as far as he could with ſafety, and then killed the deceaſed through mere neceſſity, in order to avoid his own immediate death. If the facts ſhould turn out to be ſuch that the Defendant cannot juſtify himſelf on one or other of theſe principles, ſo long as they remain the rule of law, the Defendant muſt be found guilty.

Parker, J. There is a natural exception to that rule, which you will find in the book you have read; it is, that if the retreat would be ſuch as would cauſe his own death, then the retreat is not neceſſary.

Sol. Gen. That forms a part of the rule itſelf, and is not, I preſume an exception to it. I ſhall read ſome authorities to that by and by, and will not trouble you any farther, except for the purpoſe of reading part of ſection 55, page 285:

"As to the other point to be eſtabliſhed, namely, the exiſtence of the neceſſity under which the party killing endeavours to excuſe himſelf, he can in no caſe ſubſtantiate ſuch excuſe if he kill his adverſary, even after a retreat; unleſs there were reaſonable ground to apprehend that he would otherwiſe have been killed himſelf. And therefore where nothing appeared in *Nailor's* caſe abovementioned, to ſhew that the deceaſed aimed at the priſoner's life; although he held him down on the ground, beating him, and the priſoner could not avoid his blows, it was ruled manſlaughter."

That is the rule to which your Honour referred. The author proceeds:

"It is to be noted in that caſe, that the priſoner ſtruck the mortal blow with a penknife, which was a dangerous, miſchievous weapon; from whence it was to be preſumed, that he intended to rid himſelf of the chaſtiſement which his brother was then inflicting on him, by his death. Mr. Juſtice *Foſter*, in alluding to this caſe, ſeems to lay a ſtreſs upon the want of an inevitable neceſſity, ſo as to excuſe the killing *in that manner*."

Theſe principles you will find have a direct application to the preſent cauſe; the books which contain them will be adverted to in the courſe of the trial, by thoſe gentlemen who follow me. I will only read a paſſage from *Foſter's* Crown Law, and then paſs to one or two other authorities; and that will be all that is neceſſary in the opening. I do this for your information, by which you can apply the evidence more correctly, and alſo to advertiſe the Defendant's Counſel of the books we ſhall rely on to eſtabliſh, that the Defendant muſt be convicted of the crime for which he ſtands indicted. The firſt I ſhall now read, is from *Foſter's* Crown Law, page 255:

"In every charge of murder, *the fact of killing being firſt proved*, all the circumſtances of accident, neceſſity, or infirmity, are to be ſatisfactorily

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proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant, in this instance, standeth upon just the same foot that every other defendant doth: the matter tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

There is a case, 1st. *Hale's* History of the Pleas of the Crown, page 479. It contains a single sentence only, and very short, but which appears to me directly applicable to the present case. It is this:

"A. assaults B, and B presently thereupon strikes A without flight whereof A dies; this is not manslaughter in B, and not *se defendendo*."

He furtherr adds, in page 480:

"Regularly it is necessary that the person that kills another in his own defence, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for though in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy; yet in cases of assaults and affrays between subjects under the same law, the laws own not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another."

One or two other passages in *Hawkins*, are all that is necessary to trouble you with in opening and stating the law on the subject. In 1st *Hawkins'* P. C. chap. 28, sec. 25, page 109, there is a sentence which has a remarkable degree of applicability to the present case:

"However, perhaps in all these cases, there ought to be a distinction between an assault in the highway and an assault in a town. For in the first case it is said, that the person assaulted may justify killing the other, without giving back at all; but that in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance."

You will recollect, gentlemen, the scene where this tragedy was performed, and will recollect from that scene, from the circumstances, situation, and possibility of assistance, how immediately applicable the quotation is to the present case.

One other authority I shall adduce, which will have a reference to the Defendant's being master of his temper and in possession of his mind; it is from page 123, chap. 31, sec. 23 of the book last cited:

"And whenever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration, as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c."

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These are the cases and principles which I consider to have a direct reference to the nature of the cause you have to determine. I have now stated the facts, and the only remaining duty for me to perform is to call the witnesses to prove them. But before I do that, I will give you the usual evidence of the death, or first fact—this I shall do by the inquisition taken by the coroner's jury.

Dexter. We object to the reading of that.

Sol. Gen. I read it merely to prove the fact of the death of the deceased.

Parker J. I never knew it used, but as I have not been much conversant in trials for homicide, I may perhaps be mistaken.

Att. Gen. It has been the practice to use it.

Gore. It was ten days ago attempted and rejected.

Parker J. I do not recollect that circumstance.

Att. Gen. It has been used as evidence of the death, and this before the revolution—it was done in the case of the British soldiers, and there admitted to prove the fact of the death—and it was recently offered in the case of *Fairbanks* of Dedham—it was there objected to and allowed by the Court.

Dexter. If limited to that simple object, of merely proving the death, we shall not object to it.

Att. Gen. We will go so far as to leave out the words killed and murdered.

Solicitor General was then about to read the inquisition, but was interrupted by

Dexter. We are unwilling to be troublesome, but we are told by some of the gentlemen of the bar, not now engaged, and who were engaged in the case of *Hardy*, that the same evidence was offered the present term and rejected by the Court.

Blake as *amicus curiæ.* I recollect the objection, and that I made the motion to reject the evidence, and whether the Court decided against it or not, or it was withdrawn, I cannot tell, but I recollect it was not read.

Dexter. Mr. Otis recollects that it was not read; and further that the Chief Justice overruled it; but if offered for no other object, than to prove the death of the deceased, it is really unimportant; there must, we think be some other design in offering it, and therefore we object to it.

Parker J. I really should think it, were there other evidence of the fact of the death, very important, because it might prejudice the minds of the Jury on the subject; have you not plenary evidence of another sort?

Sol. Gen. Yes, but I do it as being the course of the Court, I have no view to create an impression on the minds of the ry; we had agreed to leave out all those words which might e had that effect, and to read it merely to show that the death occasioned by the injury received from the discharge of the

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Att. Gen. Yielding points will be construed into authorities; if this is evidence to prove the death, we have a right to it, and are not obliged to wave it, the idea of rejecting it because no better is offered is not law; it is either evidence or not, if evidence, then it may be read, if a thousand witnesses to prove his death should be called they may not be believed, or may be discredited; the question is whether it be law, that the inquisition is to be read, to prove the death; if the Court say it is not to be read, then I shall never offer it in any other case, except before a full Court to obtain their opinion.

Dexter. I stopped in my objections because I understood that it was the invariable practice to read it, for we want no law that is not to apply in every other case; but if, in a recent instance, it has been rejected, we are at liberty to investigate the principles on which its admissibility is attempted to be supported. It is the verdict of a Jury in the nature of an inquest of office, where the party charged has no opportunity of examining witnesses; of being heard by himself or counsel; no Judge to lay down the law or instruct the Jury as to the nature of the offence: is it consistent with general principles that such a piece of testimony should be admitted as evidence? If then there be no usage for it, and general principles are against it, it is clear that it ought not to be received.

Att. Gen. We can show from the authority of *Hale* and *Hawkins*, that it is admissible.

Parker J. As the practice has been, as stated, both ways, I should like to hear some authorities upon the subject.

Att. Gen. We will produce the authorities at another stage of the trial, if they should be necessary.

Sol. Gen. We wave reading the coroner's inquest for the present, and now proceed to call our witnesses.

Doctor Thomas Danforth—Sworn.

Sol. Gen. Doct. Danforth, I understand you examined the deceased, and the wound of which he died; describe what you saw on that occasion.

A. I was desired on the 4th of August, by some person, I do not know who, to step into the shop of Mr. Townsend, and there I saw the body of a dying man, laying on his back; I asked where was the wound? but the confusion of the by-standers would not let me see. The shirt was torn down and the neckcloth taken off when I discovered a wound a little below the left pap, the pulse was gone, there was yet a natural heat on the skin, and I thought some slight remains of life, but no respiration. I waited about a minute, when I noticed the body to give the last gasp, immediately after which it expired. I then proceeded to examine the wound, and introduced my finger into it, and noticed that the fifth rib was cut, this I knew from the gritty feeling of the bone; at the same time Doct. Jarvis came into the shop. I took up a small hammer, and

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passed the handle of it about three inches into the wound; I might have gone further, but I saw the direction was such that it must have passed through some principal blood vessel; the wound was upward, and on withdrawing the hammer the blood flowed very freely from it; every circumstance satisfied me that he died of that wound.

Parker J. Did you know the person?

A. I did not at first.

Q. When did you recognize him to be Mr. Austin?

A. I found it was a young man described to be a Mr. Austin, but I did not know him at first—I instantly after, however recognized him.

Sol. Gen. Did you ascertain the direction of the wound?

A. Yes—It was oblique and diagonal with the trunk of the body, inclinging upwards towards the right side; it must have passed through the lungs, but not the heart, for it lodged above it.

Parker J. Have you any doubt of the death being occasioned by that wound?

A. Not the least in the world.

Sol. Gen. From the best opinion you can form, of the nature of that wound, are you of opinion which it would produce—instant death, or a temporary suspension of muscular power.

A. It is a nice question, which cannot be answered definitively or directly; we judge frequently from circumstances which have occurred—I should say, that the immense flow of blood would have produced syncope, and death; a wound of a large blood vessel might not be attended with instant death, but would produce syncope, and death afterwards.

Sol. Gen. Is it your opinion then, that if the ball had pierced the heart of the deceased, he would have retained muscular motion, or not?

A. None of the cavities of the heart could have been pierced, as no muscular action could take place after wounding a large vessel of the heart.

Att. Gen. Must not a wound of the kind of which the deceased died, produce spasm?

A. A momentrry one, a sort of convulsive action, but it must be involuntary.

James Richardson, Esq.—Sworn.

Sol. Gen. Please to state to the Court and Jury what conversation passed between the Defendant and you on the fourth of August last, immediately preceding the death of Mr. Austin.

A. I was in his office some little time before the event happened; he gave me some short account of the cause of the controversy between him and Benjamin Austin——

Parker J. You need not state that.

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Gore. We wish to take the opinion of the Court on the testimony of this witness. I was going to observe that it would be improper to go into evidence to prove malice, which I understand from the beginning of this evidence it was meant to establish, when from the definition given of manslaughter, the crime with which the Defendant is charged, there can be no malice.

Parker J. State the facts that are meant to be proved by this witness, as I cannot pretend to judge of the tendency of the evidence until it is heard.

Gore. We understand it is meant to prove the disposition with which Mr. Selfridge went upon the Exchange.

Sol. Gen. We shall prove a conversation which passed about two minutes before he went on 'Change, and three or four before he gave the mortal wound; in which he stated to the witness that every body who knew him, knew that he was a man of not a strong habit of body; that he was a weak man, and not fit for bullying or fisticuffs; that this succeeded the statement of a controversy between the Defendant and the father of the deceased.

Att. Gen. Something further may perhaps be shown. I think he testified before the Grand Jury, that he saw an advertisement in the paper of that day, signed by Mr. Selfridge in which very abusive language was used against Mr. B. Austin, calling him a liar, coward, scoundrel, &c. that he went into the office of Mr. Selfridge and entered into a conversation with him of this nature; that Mr. Selfridge told him, he was informed that B. Austin would lick him or get some other person to do it, that he could not make his way good by fisticuffs but was prepared in another manner, that the witness went out about one o'clock, and that Mr. Selfridge followed him out, and that within two or three minutes he heard the report of a pistol, and found that Austin was killed. We offer his testimony to prove that this was not done on a sudden occasion, but that the Defendant intending to destroy the life of B. Austin, the father of the deceased, or that expecting to meet some one on the 'Change employed by him, or B. Austin himself, the defendant went out with a pistol concealed in his pocket meaning to kill some person, but shot the young man. Unless the Court is of opinion that the position of the opposite counsel be correct, that we cannot offer evidence to prove malice, because it would swell the crime into murder, but if the Court are of opinion that any thing may be shown to prove that the killing was unlawful, then we propose to show what took place before.

Gore. Then from the opening it is plain they mean to prove premeditated malice, which would be murder; if they can do this, it would aggravate the offence to murder, whereas manslaughter is without malice or premeditation. We have shown that without confounding all distinctions they cannot be ad-

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mitted in this case to introduce this evidence, as it would go to prove a crime for which the defendant is 'not indicted, and against which he is not prepared to defend himself, it would be bringing up a quantity of evidence not relevant and therefore we object. But if they wish to enter into all antecedent circumstances we are ready to do so, though it would protract the cause by evidence not pertinent.

Att. Gen. We have now some authorities if the Court wish to hear them, to show that we are correct in offering this testimony.

Parker J. I wish to decide rightly, and therefore wish to hear any authorities which apply to the question. The present question is whether witnesses shall be permitted to testify to conversations immediately preceeding the attack.

Att. Gen. If that is the question, I will not trouble the Court with any authority, but we are ready if required.

Parker J. So far as I see there is no impropriety in going into the conversation, because whether the killing be manslaughter or in self-defence, will depend upon the nature of the instrument the party used, and a variety of other circumstances, anterior to the killing; but as to any preceding circumstances, which did not take place immediately before the act, it is not necessary now to decide on their admissibility.

Att. Gen. Though before the Grand Jury circumstances were given in evidence which happened seven or eight days before the fact, and some of them favorable to the prisoner, and though there are more for than against him; yet we (as this cause is of importance,) should make no objection to any thing that he might offer.

Parker J. I cannot admit evidence not applicable, though it be agreed to; I cannot go into facts that have no legal bearing on the cause, therefore the testimony must be confined to what immediately preceded the event.

Dexter. We wish to draw a line; we really want to know how far, in the opinion of the Court, a matter previous to the affray, which proved fatal, but not a part of the same transaction, is admissible or not. We are content with the proposal of the Attorney General, and would prefer it; but if the evidence to be given in behalf of the government, be of that nature which constitutes no part of the offence, as we conceive (unless malice be a part of the offence which the law has determined it not to be, because it must immediately precede the transaction) it becomes important to know how far we may go under this principle. This will be found to be connected with something immediately before; and may we not explain that by something that was previous? And may we not go on and show the whole truth? or must not the whole be rejected? We know not where we are to stop; we ask for information; what we are to do? Our apprehension is, but per-

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haps we are mistaken, that it was clearly settled in law, that manslaughter was so perfectly unpremeditated, that there could not be an accessary before the fact. Now let us suppose a case, that the witness had brought the defendant a pistol for the purpose of going into State-street, and had gone another way, the witness would not have been an accessary before the fact; because this being a crime in its nature and definition which has nothing relative to what preceded the fact, nothing can be admitted anterior, unless it formed a part of that transaction itself; and when we have left this strict ground of law, I know not where we are to stop. And if we go back, we must retrace the injury to the defendant; and if we go on link by link, it will be found greatly to his advantage. Certainly that ought not to be introduced which is against him, and that which is for him excluded.

Att. Gen. I do not wish to wear away the day about this evidence, if the Court are at all desirous of retracting their opinion, it may decide the whole question by one opinion on this head. I have no feelling on this occasion, but what I think I should have had if the deceased had killed the defendant, and therefore I shall urge nothing, which I would not in another case; but it is best that justice should be done, and that (if possible) on so broad a basis, as that no mistake or error might happen. In this case justice cannot perhaps be done as in common and ordinary cases.—Had this been an indictment for murder, the objection could not have taken place. Had it been for murder, we must have had three judges on the bench, and not have cast on your honor alone the burden of this cause, so important to the defendant and the public. On an indictment for murder, the defendant might have been found guilty of manslaughter, or of no crime. This is the first instance, where a Grand Jury has usurped the authority of deciding in a private room such a question in the first instance.—The questions proposed by the court and gentlemen of the opposite side, are different. I have had some idea or hint given me, that the subject matter of the objection, would be a principle of the defence throughout the whole cause. I thought the authorities against it; I did not conceive there was any foundation for it. To admit that no evidence can be given which would prove him guilty of murder, would, under this indictment, be a new decision. Indeed neither in practice or in any of the books, is there any thing like it; there is no precedent of any thing similar; but in many cases that have occurred, where the evidence has turned out (though the indictment was for murder) to be only manslaughter, they have on the indictment for a high crime, found the defendant guilty of a lesser. Every day's practice will support the position I maintain, the reason why evidence of a higher crime may be given on the present occasion is, that if murder be proved, the Court can inflict no higher punishment than for manslaugh-

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ter. If it be said, that if the defendant be found guilty of manslaughter, it would cast a reproach on his character. It is no reason why, if guilty of murder, he should escape, it is clear that this indictment will be a bar, whether found guilty or not, to any other indictment for the same offence; then what is the conclusion from the objection—that if the evidence tend to prove murder, (a higher crime) it must be rejected, and that the Grand Jury, having, without application to the court for instruction, found a bill for manslaughter; therefore the defendant cannot be convicted of it, though the evidence show it to be murder. If this be a legal argument, then I say, that thirty years practice in courts of justice, have only made me ignorant of the law.

In 4 Blackstone's Com. p. 329 it is expressly said, that a plea of former acquittal is a bar to a subsequent indictment.

"Special pleas in bar, which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alledged. These are four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal; but these are applicable to both appeals and indictments.

"First, the plea *autrefoits atquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any Court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment of the same offence. And so also an acquittal on an indictment was a good bar to an appeal by the common law."

In this cause, as the evidence has been opened by the Solicitor General, is expected to be shown by Mr. Richardson, that a few minutes before the fact happened he was in the Defendant's office, and he informed him that he expected a fracas with the deceased's father, who said, that he would employ some person to lick him, and he went out, and that the Defendant went out a few minutes after, prepared, not to fight with fisticuffs, but with a pistol, which he must have had in his pocket at that instant, and drew it out and shot the deceased on an attempt to assault him; and we shall prove that he knew him, and that he shot him as a person employed by the deceased's father to chastise him. The business of the present trial, is not to say that it is murder; the business of the Defendant may be, to say so, but it ought to be, that it was homicide to save his life. But this the books say, that if he means to justify from provocation, he must not himself procure or seek the quarrel; but if the evidence be, that he went on 'Change to seek a quarrel, and that when he went there he was not under the necessity of killing for the purpose of defending himself to save his life it must be manslaughter, because the description

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in the books is, that when he does so he must have no chance to repair to the laws of his country for redress; and the case put and read as to killing in the highway where it has been manslaughter, means when the country is not thickly inhabited and no person to assist, but if he went out in order to be his own defender, and would not apply to a majestrate or to another who stood by, shall it be said that this is a sudden affray, and one which he did not expect. This evidence is offered merely to show, that this was not a sudden affray, in which the killing was necessary in self-defence, but that the Defendant stept over the laws of his country, threw aside that protection which the laws of civil society would have given him, and went out to seek a combat. But if it be said, that no evidence will be received, though agreed to, if illegal, I have only one observation to make, that before the Grand Jury, all the transactions were gone into, therefore, I shall make no objection to them now.

Dexter. Will you be so good as to let me see the authority from *Kelyng*, 131.

Solicitor General. The case I referred to I find on inspection was on the statute of stabbing, and not for murder, as I imagined. Yet the principle I contended for, of *omne majus in se continet minus* is contained in the case. I thought it was an indictment at Common Law, but it was not.

"There has been another case which I fear hath been the occasion of some mistake in the decisions of questions of this kind. Jones 432, D. Williams' case, he being a Welchman, upon St. David's day, having a leek in his hat, a certain person pointed to a *Jack of Lent* that hung up hard by, and said to him, look upon your countryman; at which D. Williams was much enraged, and took a hammer that lay upon a stall hard by, and flung at him, which missed him, and hit another and killed him. He was indicted upon the statute of stabbing. Resolved, he was not within that statute, but guilty of manslaughter at Common Law. I conceive with that judgment that it is not within the statute of stabbing, for it is not such a weapon, or act that is within that statute, neither could he be found guilty of murder, but only of manslaughter, for the indictment was for no more. But if the indictment had been for murder, I do think that the Welchman ought to have been convicted thereof, for the provocation did not amount to that degree as to excite him designedly to destroy the person that gave it him."

Dexter. I had some idea of making a few observations. I was about to say, that our motives will not be thought improper when it is recollected, that the only effect of excluding illegal testimony would be to prevent the necessity of moving for a new trial; certainly it is for our interest to take the chance of an acquittal, and rely on a motion for a new trial if convicted; therefore it will appear that we can be influenced by no motive but to prevent a new trial, if we are right.

Attorney General. There must be another motive, for it is clear the verdict for the Defendant, though on improper testimony, would be final against the Government.

Parker J. I am aware of that, and therefore should be for admitting the testimony, because the Defendant cannot be injured by it, but the Government is concluded.

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Dexter. That is correct, but perhaps there might be some mischief in having another trial.

Parker J. There is; it is my misfortune to sit alone, but as I do, I must decide the best I can.

Dexter. They hold the affirmative side of the question, and therefore it is incumbent on them to show, that they have a right to introduce evidence to aggravate the crime from manslaughter to murder; although, that evidence, may not necessarily be connected with the evidence to prove manslaughter.

Our position is, that although it may be true, and probably is so, that if the evidence produced by government to prove the crime of manslaughter, necessarially connects circumstances which show malice, and therefore make it murder, and that it be manslaughter only, cannot be proved without other circumstances necessarily connected with it, then the evidence must be admissible; because the circumstances necessary to prove the crime charged to be murder, and the other matters which show it to be manslaughter only, are not divisible from it. But it would not be a good defence to say, that if the evidence should show a higher crime, the Defendant must be acquitted; because the higher involves the lesser, and if found guilty of the higher, we admit it to be law, that he cannot be innocent of the lesser. But when they go on the other side further and say, that they are at liberty to introduce other previous facts to prove a crime which the Grand Jury have charged to be manslaughter, for the sole purpose of raising the offence to a higher grade of homicide and criminality, there is no principle to authorise the position, because a man is not to be put to defend himself against a crime with which he is not charged, and because it would be fruitless, as there never can be a verdict on that to which the evidence would allude. It is stated, that an indictment and conviction for manslaughter, would be a bar on an appeal. Suppose it so, will it follow that it is therefore proper to prove in the present case, the crime to be murder, for that purpose to offer evidence tending to shew malice, when from the nature of the crime malice is excluded. It may be true that when the Government has chosen to proceed for a lesser offence they cannot resort to a higher; and is not that very circumstance a reason why the testimony ought not to be received? the case on the Statute of stabbing does not apply. Still less analogy has the decision in Kelyng, to the present case. This is all the law that can be produced, to shew that the Government can charge one crime and prove another. But we are desirous of going into the whole, and will wave our objection if the court will permit us to do so. We cannot, however, concede that facts shall be given in evidence which tend to raise the crime to one with a malicious intent, and we be precluded from shewing there was no such malicious intent, which, had the indictment been for murder we might have done. Either the whole case is before the court on the question of previous mal-

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ice, as much as if the indictment had been for murder, and therefore both parties are entitled to go into it, on this indictment for manslaughter, or nothing must be given in evidence but what relates to the act itself. This the definition of the crimes fully establishes. In 1st Hawk. P. C. ch. 13, Sect. 1, it is said,

"That which is without malice is called manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all." Sect. 2. "And from hence it follows, that there can be no accessaries to this offence before the act, because it must be done without premeditation."

Parker J. I do not wish to hear any thing further on this point. By admitting the evidence now offered, I do not consider myself as pledged to receive any other of previous circumstances. The objection made, goes to confine the knowledge of the jury to the circumstances which took place at the very instant. Though the fact itself may, if taken alone, be proved to be excusable homicide, or in self-defence, there may be other facts which would give another complexion to the transaction. If for instance a death ensue in a sudden combat, and the suddenness of the affray be proved, and relied on by the defendant, still it may be shewn that the assault was pursued by the slayer, and if so it would deprive him of his defence. Therefore the anteriour circumstances must be laid before the jury. The testimony offered is of a conversation immediately preceding the affray. Now we do not know but that there was an intent to draw the deceased into the affray. I am therefore of opinion the testimony ought to be admitted.

Sol. Gen. Proceed to state the conversation alluded to.

Ans. The first part of the conversation took place between 12 and 1 o'clock, on the 4th of August, and in the course of it Mr. Selfridge appeared to have some intimation that he should be attacked He observed, that he did not expect old Mr. Austin would attack him, but some bully employed by him. He observed further, that he did not intend to keep himself shut up, as his business required him to go abroad; that he would go out, notwithstanding any apprehension he entertained of being attacked. He added, that every man who knew him, knew he was no man for bullying or fisticuffs, or some such expression.

Att. Gen. Are you sure he used the words bullying and fisticuffs?

A. I am not certain whether he said fighting or fisticuffs; but he certainly said that he was no man for bullying, and that if he had injured any man, he was willing to meet him in a fair way. The exact expression I cannot recollect, nor do I recollect any thing further that passed in that conversation.

Att. Gen. What did you understand him to mean by saying, if he had injured any man he was willing to meet him in any fair way?

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A. I had seen a note in the Gazette of that morning; I dropt in upon him as I was passing, and began to banter him about it, and that lead to the conversation which followed.

Att. Gen. Which of you began the conversation?

A. I believe I began it myself, but I dont recollect exactly. I believe I asked him what was the controversy between him and Austin. He began to recite to me the circumstances of that controversy, and gave me a detailed account on what it was grounded, after which he said that he had received some intimations that he should be attacked, but that he should not keep himself shut up on that account.

Att. Gen. What were the precise words he used in speaking of keeping himself shut up?

A. He said it would be foolish, or silly, to keep himself shut up, when his business required him to be abroad.

Att. Gen. Did you see any arms in the Defendant's office?

A. I did not.

Att. Gen. Did the Defendant say any thing about arms?

A. He did not.

Att. Gen. Was there any person in the office during this time?

A. Mr. Shaw was in the office a part of the time that I was there.

Att. Gen. Which way did you go when you left the Defendant's offic?

A. I went down state street, and walked moderately. I was near the Branch Bank when I heard the report of a Pi tol. I think I heard the report within four minutes after I left Mr. Selfridge in his office.

T. O. Selfridge. Might it not have been longer?

A. I do not think it was.

Cross Examined.

Gore. Did not Mr. Selfridge tell you that he had used all possible means, and gone all lengths, to effect an accommodation with Mr. Austin?

A. He stated to me that he had had an application from a tavern keeper to bring an action against the republican committee at whose instance he had provided a public dinner for the party on Copp's Hill; he told me that he had put the man off two or three times and had advised him not to take out a writ; the man, however, insisting upon it, the writ was at length issued; and that Mr. B. Austin had told some persons that there would not have been any thing done about the business if it had not been for the interference of a damned federal lawyer. He said that he had Austin in his power; that he could prove that he had tried to settle the difficulty, and that Austin had promised him to contradict the aspersion, in the same public manner, and in the same places, wherein it had been made.

Gore. Did he tell you whether any body applied to Austin about it?

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A. Yes. He told me he had applied himself to Mr. Austin to contradict the report, ut he had not done it.

Dexte . Did he not inform you, that Austin had confessed that he was wrong in what he had reported, and that he promised to contradict it, and that afterwards he refused to comply with his promise ?

A. I think he did.

Att. Gen. Was it that Mr. Austin refused to contradict verbally what had been said, or that he refused to sign a paper ?

A. I am not certain of that point ?

Dexter. Did you understand that Mr. Austin was to contradict the asper ion to the same individuals before whom it was made ?

A. I understood he was to contradict it to the same individuals.

T. O. Selfridge. Did I not say that if he would recal his expressions, I would be satisfied ?

A I do not recollect. I did not endeavour to fix the particulars in my mind.

T. O. Selfridge. Did I not say that I had ordered the publication to be suspended for two or three days, in order to give him an opportunity of retracting what he had said ?

A. Yes.

T. O. Selfridge. Did not I mention to you that the last message I received from him was, that I was a damned rascal, and that I might help myself as well as I could ?

A. I do not recollect, but there was something to that effect. I have the impression from what was said that it was an offensive message.

Gore. Was he your classmate at College ?

A. Yes.

Gore. Was he not of a very weakly constitution, and very much debilitated ?

A. He never was robust or hearty.

Gore. Did he mix with you and your companions at College in manly or athletic exercises ?

A. I do not think that he did ; but if he did, I am confident he never excelled in any of them.

T. O. Selfridge. Do you recollect that I lost the use of my limbs some time ago ; that I never run, but walk deliberate and slow ?

A. I do not know myself that ever you lost the use of your limbs, nor do I recollect that I ever saw you run.

Att. Gen. Did he say any thing about declining to go to law with Mr. Austin, in order to procure satisfaction for the injury of which he complained ?

A. I do not think he mentioned any thing of that kind to me.

T. O. Selfridge. Did I show any symptoms of a vindictive temper during that conversation ?

A. No ; you were calm and cool ; at least I saw nothing like ill temper in either your words or manners.

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Benjamin Whitman, Esq. Sworn.

Sol. Gen. Relate the conversation which passed between you and the defendant previous to the death of Charles Austin, on the 4th of August last.

Whitman. In the morning of that day, I had seen the two publications in the papers, one in the Chronicle, the other in the Gazette—one signed T. O Selfridge, and the other B. Austin At the usual hour of going on the exchange, passing Mr. Selfridge's office, I saw him leaning against a cask, which stood on the flagging, near the door of his office, in conversation with a person whom I now know to have been his client. He stood with his hands folded. When I got up to him, I asked him how he and B. Austin came on. He smiled, and made this reply—I understand he has hired or procured some one or some bully (I do not recollect exactly which of the two phrases he used) to attack or to flog me I made no reply, for I thought it was a kind of smoke which would fly off when the parties grew cool and had wasted their fire. He afterwards asked me for some tobacco. I gave him some, and left him.

Att. Gen. Did he say any thing to you as to the mode of defence he meant to use?

A. He did not. I passed on, and walked pretty direct to the head of the exchange, near Mr. Townsend's shop, when stepping up on the pavement, I heard the report of a pistol. Turning myself instantly round, I saw a person in the act of striking a blow with a cane. The cane was elevated, but whether striking, or recovering from a blow struck, I cannot say positively. The defendant's position was inclining backwards: he seemed to me to be regaining a perpendicular posture, which he had lost as it were by a retreat. I saw the smoke of the pistol about breast high. The pistol itself was not raised higher than his chin. I saw a number of blows struck at him with the cane; I think as many as four. They grew fainter in succession. I saw the deceased fall, and it appeared as if some person eased him down; the deceased fell very near my feet; there was but one person between him and me: he had on a white frock, which was afterwards very bloody, I suppose from supporting the deceased when falling. Soon after this, I saw Mr. S. standing near the spot where the rencounter took place, a great crowd gathered round him. Some persons cried, Who is the damned rascal that has done this? I heard Selfridge say, I am the man, or I have killed him. He retired soon afterwards, but which way I do not know. I had some conversation afterwards with Judge Paine and Dr. Jarvis.

Sol. Gen. How near were the parties together when the rencounter happened.

A. Within the reach of each others hands.

Gore. Did you see that the Defendant's head was wounded?

A. About two hours after, I saw Mr. Selfridge, he had a wound

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on his head and another on his arm, his hat was fractured in the front part. The wound on his forehead was oozing blood at that time. It appeared to have been wiped before. I saw the wound on his arm below his elbow: the skin was broken.

T. O. Selfridge. Do you recollect that the hat was a fur one, and broken across the front where the wound appeared on my forehead?

A. It was a fur hat, and was broken across the top about two inches in length, when I saw it. This was two hours after the affray.

Parker. J. Was the breach in the hat such a one as might be occasioned by a stroke with a stick or a cane?

A. I thought so, and that the blow must have been a pretty severe one.

Dexter. Was it a black hat with a white lining?

A. It was a black hat, but I do not recollect the lining.

James Richardson, Esq. called again.

Dexter. Did Mr. Selfridge tell you it was his custom to go armed, or prepared to defend himself, on account of his debility?

A. I do not recollect any thing that passed, which led me to suppose him armed at that time.

John M. Lane—Sworn.

Sol Gen. Please to relate what you saw on the 4th of August last.

A. A little after one o'clock on that day, I was standing at the door of my shop, which is on the north side of State-Street. I was looking directly across the Street, and there saw the Defendant, whom I knew, standing on the brick pavement or side walk, in front of Mr. Townsend's shop. His face was towards me.—The person, who was afterwards shot, and whom I did not at that time know, was standing in front of the defendant, a little to the right. The Defendant stood with his arms folded, or rather crossed horizontally, the right arm being uppermost, and in that position he fired the pistol, which I saw just as it went off, at the deceased. He turned round instantly, and gave the Defendant several strokes before he fell. He was not more than a foot from the Defendant when the pistol was discharged. I saw the Defendant throw the pistol at the deceased, while he was striking—At that time blood was issuing from his mouth—He fell and I saw no more of him—I did not go from my shop door. Major Melville and a gentleman from Salem were in the shop at the time.

Att. Gen. Were there many people in the Street at the time?

A. There might be fifteen or twenty on the side walks between Congress Street and Mr. Townsend's shop. There were also some moving up and down on the stone pavement.

Cross Examined.

Dexter. Are you positive that the Defendant was facing you?

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A. I am positive.

Dexter. Are you positive his arms were crossed at the time the pistol was discharged?

A. I am positive he did not extend his arms. His right arm rested on his left when he fired the pistol.

Edward Howe—Sworn.

Sol. Gen. Mr. Howe, please to relate what you know respecting this transaction?

A. At a quarter past one o'clock on the 4th of August, I sat off from Mr. Townsend's shop in State-Street, with an intention of going home to dinner. Crossing the east end of the old State House, met Mr. Selfridge, at the distance of about two rods from Townsend's shop. He passed me about 3 feet off on my right hand. I took particular notice of him, having seen the publication in the Chronicle of that morning. He had on a frock coat, and his hands were behind him, but I am not able to say whether they were out side of his coat or not. I passed on six or eight steps, when I heard a very loud talking behind me. I turned immediately round, and the first thing I saw was Mr. Selfridge's hand with a pistol in it, and immediately the pistol was discharged. The instant afterwards, I saw the person, who had been shot at, step forward from the side walk, and strike Mr. Selfridge several very heavy blows on his head. The blows were struck with so much force that I think, if Mr. Selfridge had not had on a very thick hat, they must have fractured his skull. He stood about three or four feet from the brick pavement or side walk, in front of Mr. Townsend's shop, and was facing up the street. I saw the Defendant throw his pistol at the deceased but I cannot say whether it hit him or not, I saw it roll on the pavement towards Mr. Russell's door.

Dexter. Was the Defendant standing in the position you have described, when you first noticed him?

A. I saw him but an instant, and do not recollect seeing him change his position.

Gore. Had the deceased separated himself from the persons he was standing with, before the pistol was discharged?

A. The instant after the pistol was fired, the deceased sprang from off the brick pavement towards the Defendant and struck him as I have related before.

Parker J. The fact of killing is sufficiently proved, it is not necessary to examine other witnesses on that point.

Att. Gen. If the Court are satisfied, we will not consume any further time, though we have a multitude of witnesses to establish the fact and manner of killing.

Ichabod Frost—Sworn.

Sol. Gen. Please to relate, &c.

A. On the 4th of August last, between 1 and 2 o'clock, I was

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standing at the door of No. 75, State street, directly opposite Mr. Townsend's shop. I was looking at some gentlemen who were standing at the door of the Post Office, I heard the report of a pistol, and turning my eyes, saw the smoke, and at that instant the deceased was stepping from the side walk with his stick up. He struck Mr. Selfridge several severe blows on his head, and Mr. Selfridge either struck at the deceased with his pistol, or threw it at him: I am unable to say whether it went out of his hands or not. At this moment I saw the blood issuing from the deceased's mouth. I had seen Mr. Selfridge pass down the street immediately before I heard the report of the pistil.

Cross examined.

Dexter. How near was the Defendant to the brick pavement?

A. Within six or seven feet. His face was towards the Post Office.

Dexter. Did you see either of the parties before the pistol was discharged?

A. I did not, but instantly on the report, I turned towards them. The blows with the stick and the throwing or striking with the pistol seemed to be at the same instant.

T. O. Selfridge. When you saw me passing down the street, were my arms behind me? *A.* I cannot say.

T. O. Selfridge. How far was the place where you first saw me going down street, from the place where the pistol was discharged? *A.* About a rod.

T. O. Selfridge. Did you not see me retreat from the deceased, with my hands held up to ward off the blows? *A.* I did not.

T. O. Selfridge. Did I appear to press towards the deceased?

A. I think you did.

Att. Gen. Were there many people on the exchange?

A. There were a good many, though I think not quite so many as usual, and they were principally below the spot.

Dexter. When you first saw the Defendant, after the report of the pistol, in what position was his arm?

A. It was lifted and aiming a blow with the pistol at the deceased, who was striking with his stick at the same moment.

The Counsel for the Government said they should stop here.

Mr. GORE.

May it please your Honour, Gentlemen of the Jury,

Permit me to ask your candid attention and indulgence, while I address you, in behalf of the Defendant at the Bar, who stands charged by the grand Inquest of this County, with the crime of manslaughter. A patient investigation of the evidence, so far as is necessary to the attainment of truth; a strict observance of the law of the land, as it is derived from the nature and character of man, as it is recorded in our books, as it has been invariably known and practised in all civilized countries, as well as in our own, and

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as it shall be pronounced to you by the Court, with a due regard to such arguments and observations, as may be founded in reason and common sense, uninfluenced by any considerations, unbiassed by any impressions, but what shall be imposed by the law and the testimony, constitute what I have a right to ask, and be assured, Gentlemen, notwithstanding the solicitude I may justly be presumed to feel on this occasion, it is all I have even a wish to attain.

After the most mature reflection on this cause, (such as I trust it will appear to you, when the whole transaction is exposed) I cannot prevail on my mind to raise a doubt, as to the issue, however important that may be to the public justice of the country, and however interesting to the property, the freedom, and character of my client, provided the case be decided on its own real and intrinsic merits. Yet I cannot but feel some apprehension, from the various measures taken to pre-occupy the public mind, nor will it be surprising that I should be thus apprehensive, when you call to mind the cruel, illegal, and unjustifiable means, which have been resorted to, through the medium of the newspapers, to influence the judgment of all men, to inflame the passions, and cause such an agitation throughout this whole community, that its effect might be felt even here, where the rights of all require, that justice, assisted by the calmest deliberation, should alone preside. Whence should be banished every thing that can tend to move the passions, every thing that can disturb the judgment or excite the imagination, where should be admitted no impression, but from the unerring voice of truth and of law, which are the same to all men, and on all occasions; which bend not to the supplications of mere distress, however extreme or deplorable, nor to the clamors of the few or the many, however overbearing in power, or terrific in threat, however eager and violent in their calls for the sanction of judicial authority, on their own wild and intemperate decrees.

It will not be strange, that I should feel something even like dismay, when I behold the effect of this excitement in the immense multitude that crowd, that throng this place. Many doubtless, are brought hither by the most laudable motives, to witness a process, the most solemn, in a case, affecting an individual in every interest, that can be dear to man, on this side the grave. If there be any who come here with other views, more or less exceptionable, I am sure they have seen nothing, and that they will see nothing in the conduct and decision of this cause, but what will convince them of this irrefragable truth, that the liberty, the life, the reputation and the property of every man, essentially and mainly depend on the impartial administration of justice, and be assured, Gentlemen, this is true at all times and on all occasions, whatever passion, prejudice, or party spirit may whisper to the contrary, or attempt to urge as an exception. On the impartial administration of justice, I repeat, depend at all times, and on all occa-

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sions, the liberty, the life, the reputation, and the property of man. In the very best times, it is the best reliance, and surest foundation for all the rights of all men. In evil times, which sooner or later befal every community, it will be found the only protection for the possessions of the rich, against the grasp of the needy, and the violence of the profligate; the only safeguard and shield for the rights of the poor and oppressed, against the insolence of wealth and power. May we not, then indulge the hope, that all men, of whatever sect or party they may be, persuaded of this truth, which will be the more apparent, the more it is reflected on, will bring to the altar of public justice, all their passions and their prejudices, a willing sacrifice for their own good, and that of their country.

From the nature and circumstances of this case, known as they were, or could have been, at the moment of this dreadful catastrophe, which we all deplore; from the age, and relation of the deceased to the cause of that fatal event, which is the subject of our present inquiry; the most unfavourable conclusions were made against my client. The deceased was a young man, just emerging from a state of pupilage to that of manhood, glowing in all the bloom of youth, and pride of strength; to behold him, of graceful and well proportioned form, of athletic muscle, and of nervous arm, in a moment, stretched lifeless on the ground, his heart's blood gushing in copious streams from his manly face and breast, called forth the commisseration and regret of every beholder. These feelings almost instantly changed to resentment against him, who was supposed to have done the deed; for of the hundreds, I may say, thousands, who saw the last part of this tragic scene, there were not ten, perhaps not five, who saw the whole transaction, and witnessed the necessity imposed on the Defendant, a necessity, with which he could neither equivocate nor compromise, of preserving his own life, at every expense to him who assailed it. And yet even of these, some, hurried away by the impulses of the instant, and catching the contagion of other men's passions, surrendered their judgment to their emotions, and joined in the general execration; and found, or thought they found, an apology for this strange abandonment of their reason, by assuming the doctrine, that no man can innocently spill the blood of another; a position, unsupported by any law, human or divine, and contradicted by every principle of nature and of reason.

I shall contend, and I have too much respect for those I address, to doubt of proving, that every individual has not only the right, but is in duty bound to defend his own life, at every hazard and expense to him who assaults it.

The principle of self defence is founded in the very nature and constitution of man. It is inherent in, and inseparable from his character. It it not derived from books, nor from the institutions of civil society, though confirmed by them. It is born and created

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with us, is coexistent with the first germ of life, conceived, felt, and apparent in the earliest dawn of being, and continues the same through all stages, relations, and conditions of human existence. Without this right, and without its exercise, whenever the occasion arises, man could perform no duties, and enjoy no rights. He could not discharge even those duties imposed on him by a state of nature, neither could he fulfil those superadded obligations, created by, and incurred in a state of society. If this be true, and that it is, is so self evident, that none can or will deny it, the consequence indisputably follows, that man has not only a right, but is in duty bound, a duty, which he owes to himself, to society, and to his Maker, to defend and protect his own life, by all the means in his power, at every hazard and expense to him who shall assault it, and, however disastrous the consequences may be, the same are imputable not to the man assailed, but to him who imposed the necessity.

The institutions of civil society are made, not only for the whole, but for every part, and to confirm those rights, which are derived from nature, and which are necessary for the performance of such duties, as are enjoined on man, by the laws of society.

The first and fundamental principle of every government is, that obedience to the government, and protection to the subject, are reciprocal; and whenever statutes are made, to abridge so essential a right, as that of self defence, they are bottomed on this condition, implied as strongly, as if expressed in language the most forcible, that the government can and will afford complete and perfect protection. The minor and subordinate rights a subject is forbidden to defend, by force, because the laws of society hold out restoration, if deprived of them, or a full indemnity for the injury sustained by their loss. Now life, once taken away, cannot be restored, and for the privation of being there is no indemnity. It follows then, that every man is authorised, and in duty bound to protect and defend his own life, when the government does not or cannot afford protection, at every hazard, and expense of life to him who assaults it. Vain and absurd, nay impracticable would be that statute, which should demand of an individual to wait the slow and formal decision of a court of law, when the uplifted hand of violence was just ready to sink him to the earth, to place him beyond the relief, beyond even the reach of any earthly tribunal. I have said, that the laws of civil society admit and confirm this right of self-defence—they go further—they authorise and justify a man, in taking the life of another, who shall attempt, feloniously, to enter his house in the night. They justify the taking the life of one who shall attempt to rob a man of the smallest mite of property. The law excuses a man, who shall take the life of another on a necessity, apparent, though not real, of defending his own.

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When I shall read some of the authorities, which contain the law of our own country, you will be convinced, that I have advanced no one principle, which they do not warrant; neither do I wish, gentlemen, to extend them beyond their fair import, in behalf of the cause I defend. At present, my only purpose is, by propositions so plain, as must command the assent of every human understanding, to efface any erroneous impressions, which may have been made in relation to the law on this subject.

There is another important charge and prejudice, against my client, which I wish, and trust to remove. It is founded on this fact, viz. that he had in his pocket a pistol, with which he preserved his life, against a man, who would have beaten out his brains with a club—an instrument as effectual, for the purpose of producing death, as a pistol; and, in some views, even more so: for the pistol once discharged of its ball becomes useless, and unless some vital part be struck, the advantage is altogether in favour of him holding the club. A misplaced blow with a cane, may be corrected, until, with increased skill, and redoubled vigour, the assailant bring his victim dying, and dead at his feet. I, however, wish to bring before you, the single circumstance of wearing a pistol, distinct from any relation to the particular case of the Defendant, or the reason, which had the law been, as is pretended, might and would have justified him, in wearing an instrument of this sort. There is no law written or unwritten, no part of the statute or common law of our country, which denies to a man the right of possessing or wearing any kind of arms. In every free society a man is free to do that, which the law does not interdict, nor can the doing that, which is not forbidden be imputed as a crime. But it may be again said, as it has been already, that possessing a pistol is evidence of malice. If it be lawful to possess and wear such an instrument, it would be unjust, in the highest degree, to make it, unconnected with any thing else, evidence to change another act, lawful in itself, into an act criminal and unlawful. For instance, it ought not, and I trust would not, in the opinion of any court or jury, change a justifiable homicide into manslaughter, or manslaughter into murder.

I will attempt to illustrate this, by putting one or two cases.—Every man has a right to possess military arms, of every sort and kind, and to furnish his rooms with them. Suppose a man, occupying a house thus furnished, is visited by a neighbour, and after some warm conversation an affray ensues, the owner glances his eye on a sword, instantly snatches it from its place, and destroys his neighbour—But for such possessing the instrument of death, the act would, I presume, be manslaughter. Can such possession be so tinctured with criminality, as to aggravate this act, otherwise only manslaughter, to the crime of murder!—If so, do but change the parties: Suppose the visitor to cast his eye on the sword, and under like circumstances, to use the same instrument, to the des-

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truction of his opponent, he would be guilty of manslaughter.—Can the mere circumstance of not being owner of the instrument used, alter the act from murder to manslaughter?

Further, a man, about to travel on a road, infested with robbers, and knowing it to be lawful to kill another, who attempts to rob him, arms himself with a pistol—on the road, he is attacked by one, who attempts to rob him, and, in the exercise of his rights, uses his pistol and destroys the life of the aggressor. If the having a pistol with him be an argument against his innocence, an act, lawful in itself, will be deemed unlawful, merely because the agent had the precaution to supply himself with the means of doing that, which the law authorised him to do.—Again, suppose a man, having occasion to travel a road, infested by robbers, provides himself with a pistol for the purpose of defending his person and property: on the way to the road, on the road, or on his return from the road, he is met by one, who attacks him, without any intention of robbing, but with a view of assaulting his person only, and the attack is made with so much violence, as to put his life in imminent hazard, whereupon he uses the pistol and destroys the assailant.—Shall you draw from the fact, of his having a pistol, for the just and lawful purpose of defence, against one sort of violence, and using it to another, equally just and lawful, an argument to turn a justifiable homicide into the crime of murder? Surely a doctrine, which leads to such absurd consequences, cannot be founded in truth and justice, and it is on these principles, that this cause must be decided.

The quality of every act must be determined, according to the intention and motive of the agent, at the moment of acting. It is by this intention and motive, that you must decide the quality of the act, not by the manner of doing it, or the event. So says our law, and so say the laws of God and of reason. For should a man have an instrument of death for an unlawful purpose, and be compelled to use it for one lawful and just, it would be the extreme of injustice, so to tincture this lawful act, by an unlawful intention, which was never executed, as to render that criminal, which was just and right in itself. For instance, suppose a man armed for the unlawful purpose of fighting a duel—in his way to the place of assignation, he is met by a person, who attacks him, and, in defence of his own life, he destroys the assailant—can you say, that the having a pistol would make this act a crime? If so, it would be to confound every principle of law and justice—you would decide a lawful and just act to be a crime of the most aggravated nature, merely because of an unlawful intention, unexecuted, which, at the worst, could be but a misdemeanour.

From these premises I draw this inference, that you cannot make any conclusion against the Defendant, from his having a pistol about him. It cannot be of the smallest weight: for if he had

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it, with an intention, that was lawful, it cannot afford an unlawful quality to this act of homicide. If he possessed it, for any other purpose, not lawful, and used it for a lawful end, it will not alter the nature of such lawful act. If you shall be satisfied, that the homicide committed was either justifiable or excusable in self-defence, all presumptions, from Mr. Selfridge's having a pistol with him, are totally at an end: for presumptions are resorted to only, in the absence of express testimony. Wherever there is express evidence, presumptions are necessarily excluded; otherwise you will go into the wide field of conjecture and uncertainty, when you have certainty to rely on. If you shall be satisfied, from all the circumstances which happened, at the moment of acting, that the homicide charged was a lawful act of self-defence, all further inquiry will be precluded, and, much more so, all presumption or conjecture of unlawful motives, from any preceding act.

For the purpose of enabling you fully to understand the nature of the charge against the defendant, I shall read to you the law on the subject of homicide, and firstly from 3 Coke's Inst. p. 56.

"Manslaughter is felony, and hereof there may be accessaries after the fact done: but of murder, there may be accessaries, as well before, as after the fact.

"Some be voluntarily, and yet being done upon an inevitable cause, are no felony. As if A be assaulted by B, and they fight together, and before any mortal blow be given, A giveth back, until he cometh unto a hedge, wall, or other strait, beyond which he cannot pass, and then in his own defence, and for safeguard of his own life, killeth the other: this is voluntary and yet no felony, and the jury, that find it was done *se defendendo*, ought to find the special matter. And yet such a precious regard the law hath of the life of man, though the cause was inevitable, that at the common law, he should have suffered death: and though the statute of Glocester save his life, yet he shall forfeit all his goods and chattels. Hereof there can be no accessaries, either before or after the fact, because it is not done *felleo animo*, but upon inevitable necessity *se defendendo*. If A assault B so fiercely, and violently, and in such a place, and in such manner, as if B should give back, he should be in danger of his life, he may in this case defend himself; and if in that defence he killeth A, it is *se defendendo*, because it is not done *felleo animo*, for the rule is, when he doth it in his own defence, upon any inevitable cause, *Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.**

I shall now call your attention to Foster's Crown Law, p. 273.

"Self-defence naturally falleth under the head of homicide founded in necessity, and may be considered in two different views.

"It is either that sort of homicide *se et sua defendendo*, which is perfectly innocent and justifiable, or that which is in some measure blameable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law.

"The writers on the crown-law, who, I think, have not treated the subject of self-defence with due precision, do not in terms make the distinction I am aiming at, yet all agree that there are cases in which a man may without retreating oppose force to force, even to the death. This I call justifiable self-defence, they justifiable homicide.

* *What every one doth for the defence of his body, he seemeth to do lawfully.*

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"They likewise agree, that there are cases in which the defendant cannot avail himself of the plea of self defence without shewing that he retreated as far as he could with safety, and then, merely for the preservation of his own life killed the assailant. This I call self defence culpable, but through the benignity of the law excusable.

"In the case of justifiable self defence the injured party may repel force by force, in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable.

"The right of self defence in these cases is founded in the law of nature, and is not, nor can be, superceded by the law of society. For before civil societies were formed (one may conceive of such a state of things, though it is difficult to fix the period when civil societies were formed) I say before societies were formed for mutual defence and preservation, the right of self defence resided in individuals; it could not reside elsewhere; and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law, with great propriety and strict justice, considereth them, as *still in that instance*, under the protection of the law of nature.

"Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force; and his servant then attendant on him, or any other person present may interpose for preventing mischief, and if death ensueth, the party so interposing will be justified. In this case nature and social duty co-operate."

There may, gentlemen, be some confusion in your minds from the expression "a known felony." In order to do it away, and explain what is meant when the terms "of a known felony being intended" are made use of, I shall read some authorities to shew you that when there is, from circumstances, an apprehension of this tendency, the party is excused and may justify the killing his opponent. The first I shall advert to, is from East's P. C. 276.

"Other cases have occurred, wherein the question has turned upon the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. As in Mawgridge's case: who upon words of anger between him and Mr. Cope, threw a bottle with great violence at the head of the latter, *and immediately drew his sword*: on which Mr. Cope returned a bottle with equal violence; which, says Lord Holt, it was lawful and justifiable for Mr. Cope to do; for he who hath shewn that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand. The words previously spoken by Mr. Cope could be no justification for Mawgridge; and it was reasonable for the former to suppose his life in danger when attacked with so dangerous a weapon, and the assault foollowed up by another act indicating an intention of pursuing his life; and this at a time when he was off his guard, and without any warning. This latter circumstance forms a main distinction between that case and the case of death ensuing from a combat, where both parties engage upon equal terms: for there, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon, suspend his arm till he has warned the other, and given him time to put himself on his guard; and afterwards they engage on equal terms; in such case it is

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plain that the design of the person making such assault is not so much to destroy his adversary at all events, as to combat with him, and to run the hazard of his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood, which has before been treated of."

In the same work, page 273, the author speaking of known felonies, says—

"There seems, however, to be a distinction between such felonies as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different sort, if no resistance be made by the felon; and therefore a party would not be justified in killing another who was attempting to pick his pocket. But if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons. The above is further confirmed by the term *known felony*, made use of in our books, which contra-distinguishes it from secret felonies; and seems to imply, that the intent to murder, ravish, or commit other felonies, attended with force or surprise, should be *apparent*, and not left in doubt: for otherwise the party killing will not be justified. It must plainly appear, says Lord HALE, speaking of a felonious attack upon B, by the circumstances of the case, as the manner of the assault, the weapon, &c. that his life was in danger, otherwise the killing of the assailant will not be justifiable self-defence.

"Yet still if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition kill him; although it should afterwards appear that there was no such design, it will only be manslaughter, or even misadventure; according to the degree of caution used, and the probable grounds for such belief. As where an officer, early in the morning, pushed abruptly and violently into a gentleman's chamber in order to arrest him, not telling his business, nor using words of arrest; and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber, and stabbed him: it was ruled manslaughter at common law, though the defendant was indicted on the statute of stabbing. It is to be inferred from the form of the indictment; and what was said by Lord HALE, that the bailiff had no offensive weapon in his hand, from whence the party might reasonably have presumed that his life or property was aimed at; and therefore there seems to have been a manifest want of caution in not demanding the reason of such intrusion by a stranger; especially as some interval must have elapsed before the sword was taken down and drawn."

From this authority it will appear that the officer went into the room without any weapon, and there could be no inference that he intended any bodily harm, yet it was held manslaughter; but if he had had an offensive weapon, it would undoubtedly have been excusable if not justifiable homicide; this would have been so on the apparent attempt, and therefore if a man has reason to suppose any felony is to be attempted on him, he has a right to defend his own life, by taking that of his assailer.

I will now read a case from the opinion of Powell J. in Nailor's case.

"If A strike B *without any weapon*, and B retreat to a wall, and then stab A, that will be manslaughter, which HOLT C. J. said was the same

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as the principal case, and that was not denied by any of the Judges.—For it cannot be inferred from the bare act of striking without any dangerous weapon, that the intent of the aggressor was so high as the death of the party stricken, and without there be a *plain manifestation of a felonious intent*, no assault, however violent, will justify killing the assailant under the plea of necessity."

It would seem here that if the party who kills, was resisting a person who had a dangerous weapon, it would be excusable homicide; and Nailor's case, which has been read to you by the Solicitor General, turned on that principle; for though the prisoner there, was the first in fault, it is clearly inferable, that if the other who was killed had had a dangerous weapon, it would have been justifiable homicide and not manslaughter, or at most excusable homicide.

On the same point as to the apprehension of a felony, I shall adduce the same authority, page 293.

"HAWKINS indeed says, that if a servant, coming suddenly, and finding his master robbed and slain, fall on the murderer immediately and kill him, it may be justified; for he does it in the heat of his surprise, and under just apprehensions of the like attempt on himself. But he adds, that in other circumstances (which must be understood where he has no just reason to apprehend the like attempt on himself, and the fact is not recent) he could not have justified the killing of such an one, but ought to have apprehended him. The fact will be either murder or manslaughter, according to the circumstances above alluded to."

You have already heard, gentlemen, that a man has a right to defend his own habitation, by taking the life of another who attempts to enter it feloniously. In the same book from which I last read to you, it is laid down in page 321.

"In civil suits the officer cannot justify the breaking open an outward door or window to execute the process: If he do, he is a trespasser, and consequently cannot be deemed acting in the discharge of his duty. In such case, therefore, if the occupier of the house resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose for himself and his family. And it is not murder in this case, says Lord Hale, because it is unlawful in the officer to break the house to arrest. Secondly, it is manslaughter, because he knew him to be a bailiff. But, thirdly, had he not known him to be a bailiff, or one who came on that business, it had been no felony, because done in his house. This last instance, which is set in opposition to the second, must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent; and that the party did not know, as in the second instance, nor had reason to believe, that it was merely a trespasser with a different intent."

I shall now quote another passage from the same book, of which perhaps you will see the applicability as I read, though it may possibly strike you more forcibly after you have heard the evidence.—It is from page 278.

"If A challenge B, who declines to fight, but lets A know that he will not be beaten, but will defend himself: and B going about his oc-

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casions, and wearing his sword, be assaulted by A, and killed; this is clearly murder. But if B had killed A upon that assault, it would have been *se defendendo*, if he could not otherwise have escaped, or bare manslaughter, if he might and did not. But if B had only made this a disguise to evade the law, and had purposely gone to a place where it was probable he should meet A; then it had been murder: but herein the circumstances at the time of the fact done must guide the jury."

Thus if the person who is threatened says, I will not fight, but I will not be beaten, and under these circumstances meets a man who attacks him, and in resisting that man, destroys him, it is justifiable self-defence, and that I take to be the law of this case.

In page 393, which I shall now read to you, you will find principles equally governing the present occasion.

"A mayhem, or maim, at common law is such a bodily hurt as renders a man less able in fighting to defend himself or annoy an adversary: but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or fore-tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims, but the cutting off his ear or nose are not such at common law. But in order to found an indictment or appeal of mayhem, the act must be done maliciously; though it matters not how sudden the occasion."

You have it in evidence, gentlemen, that the defendant's skull was attempted to be broken; and as the authorities say, if a man be attacked by another with a view to commit a felony, that is, a known felony, as the law terms it, he may take away the life of the assailant. I shall now read a part of the same page to shew that a mayhem is a felony.

"All maims are said to be felony; because antiently the offender had judgment of the loss of the same member, &c. which he had occasioned to the sufferer: but now the only judgment which remains at common law is of fine and imprisonment."

I have quoted these last passages for the purpose of shewing that breaking a man's skull is a mayhem, and that every mayhem is a felony. We shall give the most satisfactory proof that the deceased intended to break the defendant's skull.

From a book which has been cited on the part of the government, I shall beg leave to read a few lines; it is from 4 Blackstone's Com. 184.

In the same volume of the same learned author, p. 192, he says,

"Manslaughter therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge."

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If, therefore, there was an apparent necessity, and if putting yourselves, gentlemen, in the defendant's situation, you think there was a necessity of preserving his life by taking away that of the deceased, it was done in excusable self-defence.

Manslaughter is a sudden act of revenge, excusable self-defence when there is an apparent necessity, though it may turn out not to be real, as was the case of the gentleman who was attacked in his room.

That this is the true distinction between manslaughter and excusable self-defence, I refer to

1 Hale's Hist. P. C. 479. "Homicide *se defendendo* is the killing of another person in the necessary defence of himself against him that assaults him."

"In this case of homicide, *se defendendo*, there are these circumstances observable."

"1. It is not necessary that the party killed be the first aggressor or assailant, or of his party, though commonly it holds."

"There is malice between A and B, they appoint a time and place to fight, and meet accordingly. A gives the first onset, B retreats as far as he can with safety, and then kills A, who had otherwise killed him; this is murder, for they met by compact and design, and therefore neither shall have the advantage of what they themselves each of them created."

Ibid. 482. "In respect to the manner of the assault."

"If A assault B so fiercely, that B cannot save his life if he gives back, or if in the assault B falls to the ground, whereby he cannot fly, in such case if B kills A, it is *se defendendo*."

I will now support these positions from 1 Hawk. P. C. 113.

"And now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house) kills the persons by whom he is reduced to such an inevitable necessity.

"And not only he who on an assault retreats to a wall, or some such streight, beyond which he can go no further, before he kills the other, is judged by the law to act upon unavoidable necessity: but also he who being assaulted in such a manner, and such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all."

In the Queen *vs.* Mawgridge, Kel. 120. "The jury found this special verdict: That William Cope was lieutenant of the Queen's Guards in the Tower, and the principal officer then commanding there, and was then upon the guard in the Guard-room: And that John Mawgridge was then and there, by the invitation of Mr. Cope, in company with the said William Cope, and with a certain woman of Mr. Cope's acquaintance, which woman Mawgridge did then affront, and angry words passed between them in the room, in the presence of Mr. Cope and other persons there present, and Mawgridge there did threaten the woman; Mr. Cope did thereupon desire Mawgridge to forbear such usage of the woman, saying that he must protect the woman; thereupon Mawgridge did continue the reproachful language to the woman, and demanded satisfaction of Mr.

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Cope, to the intent to provoke him to fight; thereupon Mr. Cope told him it was not a convenient place to give him satisfaction, but at another time and place he would be ready to give it to him, and in the mean time desired him to be more civil, or to leave the company; thereupon John Mawgridge rose up, and was going out of the room; and so going, did suddenly snatch up a glass bottle full of wine then standing upon the table, and violently threw it at him the said Mr. Cope, and therewith struck him upon the head, and immediately thereupon, without any intermission, drew his sword and thrust him into the left part of his breast, over the arm of one Robert Martin, notwithstanding the endeavour used by the said Martin to hinder Mawgridge from killing Mr. Cope, and gave Mr. Cope the wound mentioned in the indictment, whereof he instantly died. But the jury do further say, that immediately, in a little space of time between Mawgridge's drawing his sword and the giving the mortal wound by him, Mr. Cope did arise from his chair where he sate, and took another bottle that then stood upon the table, and threw it at Mawgridge, which did hit and break his head; that Mr. Cope had no sword in his hand drawn all the while; and that after Mawgridge had thrown the bottle, Mr. Cope spake not. And whether this be murder or manslaughter, the Jury pray advice of the Court."

In delivering the opinion of the Judges upon this verdict, Holt C. J. has the following passage—page 128:

"In the second place, I come now to consider whether Mr. Cope's returning a bottle upon Mawgridge, before he gave him the mortal wound with the sword, shall have any manner of influence upon the case: I hold not. First, because Mawgridge by his throwing the bottle had manifested a malicious design. Secondly, his sword was drawn immediately to supply the mischief which the bottle might fall short of. Thirdly, the throwing the bottle by Captain Cope was justifiable and lawful; and though he had wounded Mawgridge, he might have justified it in an action of assault and battery, and therefore cannot be any provocation to Mawgridge to stab him with his sword. That the throwing the bottle is a demonstration of malice, is not to be controverted; for if upon that violent act he had killed Mr. Cope, it had been murder. Now it hath been held, that if A of his malice prepensed assault B to kill him, and B draws his sword and attacks A and pursues him; then A for his own safety gives back and retreats to a wall, B still pursuing him with his drawn sword, A in his defence kills B. This is murder in A. For A, having malice against B, and in pursuance thereof endeavouring to kill him, is answerable for all the consequences, of which he was the original cause. It is not reasonable for any man that is dangerously assaulted, and when he perceives his life in danger from his adversary, but to have liberty, for the security of his own life, to pursue him that maliciously assaulted him; for he that hath manifested that he hath malice against another, is not fit to be trusted with a dangerous weapon in his hand. And so resolved by all the Judges, 18 Car. 2, when they met in preparation for my lord Morley's trial."

Having read to you, gentlemen, the authorities which confirm, and go indeed beyond the principles I stated, I will proceed before I remark on the testimony adduced on the part of the government, to call some witnesses which the gentlemen on behalf of the Commonwealth called, but did not choose to examine; that we may obtain from them the whole of the testimony respecting this transaction.

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John Bailey—sworn.

Gore. Please to relate what you know respecting the transaction now under consideration.

A. On the fourth of August, a little before one o'clock, being at work in Mr. Townsend's shop, I saw Charles Austin pass down the street, and afterwards saw him pass up as far as Mr. Smith's, he returned and took his stand directly in front of the shop where I was at work. Young Mr. Fales was with him; Austin had a stick in his hand of an unusual size. I had most frequently seen him with a rattan.—I said to a person in the shop "we shall have a caper." Soon after I saw the defendant passing down street:—he had his right hand in his pocket, his left hanging down. I was standing in the door way of the shop, the door being open—When Mr. Selfridge first came in sight, the deceased was standing on the side pavement in front of the shop in conversation with Fales, and playing with his cane. The moment the defendant caught his eye, he left Fales, and stepped off the brick pavement into the street.—He moved with a quick pace, and while going shifted his cane from his left to his right hand—after he had got off the pavement, he turned and went towards the defendant with his cane raised up.—They met about seventeen paces from the place the deceased had left.—The deceased held the cane by the upper or largest end.

Parker J. Did you take particular notice of the cane?

A. I did, and think this which I hold in my hand is the same—it is a solid one—The cane was uplifted, and actually descending to give a blow at the time the pistol was discharged. The blow was not struck till after the pistol was fired.

Parker J. Did it appear to you that the blow was intended to be given with the full force of the deceased?

A. It did so appear to me.

Att. Gen. Do you say on your oath that the blow was descending before the pistol was fired?

A. I do. The first blow was a long blow, which staggered the defendant. The deceased struck four or five blows after the first.

Gore. Was the first blow on the defendant's forehead?

A. It appeared to me so. It was struck sideways, and I thought passed under the defendant's hat.

Gore. After the first blow, did the defendant hold up his hands to ward off the blows from his head?

A. He did. As the blows were repeated, the defendant aimed a blow at the deceased with his pistol, but I do not know that it hit him. At this time the defendant's face was down street, and inclining towards the shop where I stood.

Gore. Could Mr. Selfridge readily see Austin advancing towards him?

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A. He could; and he stopped the instant Austin stepped off the side walk.

Gore. Where would Mr. Selfridge's course have carried him, had he pursued it?

A. To the corner of Congress-street.

Att. Gen. How many people were there on the Exchange?

A. I cannot tell; as many as usual.

Att. Gen. Were there any between you and the parties?

A. There were.

Att. Gen. Was any one between Selfridge and Austin, when the latter left the side walk?

A. There were some on the side walk with Austin, and he passed between two gentlemen as he stept off into the street. The place where they met was nearly in a direct line from Mr. Townsend's shop to the northeast corner of the old State house.

Att. Gen. How far from that corner?

A. About thirty of my paces.

Att. Gen. How far from the shop?

A. About seventeen paces.

Gore. When the deceased went off from the side walk, with his cane up, in the manner you have described, did any person attempt to stop him?

A. No.

Foreman. If Mr. Selfridge had pursued the course he was taking, and the deceased had stood still, what would have been the distance between them, when abreast of each other?

A. Ten or twelve feet. I think Mr. Selfridge would have passed within three or four feet of the side walk in front of the shop, which is seven feet wide.

Att. Gen. Did the defendant incline towards the shop?

A. He inclined towards the south side of the street, keeping a straight course until he was attacked.

Gore. Was any one between the defendant and the deceased, so that the defendant could not have seen the deceased before he had stept off the side walk?

A. There were two gentlemen standing on the edge of the side walk, between whom the deceased passed, but I do not know whether they so covered the deceased that the defendant could not see him, until he had passed by them.

Zadock French—sworn.

Gore. Please to relate to the Court and Jury what you know concerning this cause.

A. About one o'clock on the 4th of August I was going up State-street, and when near Mr. Townsend's shop, I heard a person say there was to be a scuffle. I recollected the piece in the news-paper, and stopped. The same person said, there's Selfridge.

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I looked up and saw him coming round the N. E. corner of the old State House. I made this observation; they were pretty equally matched. He walked very deliberately with his hand behind him or under his coat. His course was towards the Branch Bank. When opposite to me, he was a little south of the middle of the street. All at once he turned or wheeled towards me—at the same instant Austin stept off from the brick pavement and walked with a very quick step towards him having his cane raised; he made towards him as a man would rush upon a wild beast; Selfridge, as he turned towards me, presented a pistol, as if to defend himself.—It appeared to me that Austin's breast went against the muzzle of the pistol—Austin struck the defendant a blow on the head, and the pistol was fired at the same instant.

Dexter. Was the blow a heavy one?

A. It appeared to me so.

Parker J. Was the pistol held out, before you saw Austin advancing towards the defendant?

A. I think it was not.

Parker J. Did the defendant advance towards the deceased after he turned?

A. No, he stepped one foot back, as if to put himself in a posture of defence.

Att. Gen. Were there many people on 'Change?

A. There were a good many, but they stood chiefly lower down the street.

Att. Gen. Did you hear Selfridge say any thing after the fact?

A. When people cried out, who is the damned rascal, who did it? Mr. Selfridge said, "I am the man."

Gore. Did you see Mr. Selfridge attempt to wrest the cane from the deceased?

A. He took hold of the cane after firing the pistol, but Mr. Austin retook it, apparently with great ease.

Gore. At what distance would Mr. Selfridge have been from Mr. Austin in passing by, if the latter had kept his situation, and Mr Selfridge pursued the course he was going?

A. I should think fifteen or twenty feet.

Gore. How far from the side walk did they meet?

A. About the same distance.

Gore. Were there any persons between Austin and Selfridge when the latter came in sight?

A. I believe there were none.

Gore. When Austin was going towards the defendant, was his cane raised?

A. The end which he had hold of was even with his hip, the other end was elevated about to the height of his shoulder.

Foreman. Was Mr. Austin standing next the wall, or at the edge of the side walk?

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A. I cannot tell. Not knowing Mr. Austin, I did not observe him until I saw him step from the side-walk.

Dexter. When Mr. Selfridge wheeled towards you, was the deceased at that moment stepping towards him?

A. He was—at the very moment.

Att. Gen. Did you see the pistol before it was fired?

A. I did.

Att. Gen. Did any time pass from Selfridge's taking out the pistol, and his firing it?—Did he come to a rest?

A. The whole was instantaneous—I saw nothing like coming to a rest.

The Court was then adjourned to Wednesday morning, nine o'clock.

Wednesday Morning, 9 o'clock.

The Court opened pursuant to adjournment. Evidence in the defence continued.

Richard Edwards—Sworn.

Gore. Please to relate what you saw, &c.

A. As I was passing in State-street a little past one o'clock, I saw Mr. Benjamin Austin going down the street—heard some one say there would be some scuffling.—Standing with Mr. French near Mr. Townsend's shop, I saw Mr. Selfridge come round the northeast corner of the old State-house—He was passing slowly in a direction towards the Branch Bank—I pointed him out to Mr. French, who did not know him—In less than a minute a person passed quick from behind me towards the street, and brushed my arm as he passed me. This occasioned me to turn, and I saw the same person walking quickly towards the middle of the street—by the time I had turned he had got nearly to the middle, and I saw Mr. Selfridge immediately before him, with his arm extended, and a pistol in his hand. The person had a cane in his hand, and at the instant the pistol was discharged, I saw the cane elevated, but am not able to say whether it was descending to strike a blow, or recovering from striking one. After the pistol was discharged, the deceased struck several blows with the cane. Mr. Selfridge raised his arms, but whether to give blows, or to ward off those aimed at him, I am not able to say.—The defendant retired to the side walk near me, and leaned against Mr. Townsend's shop, when the deceased fell.

Dexter. Was the first blow with the cane a very severe one?

A. I think it was not so severe as some of those which were struck afterwards.

Dexter. Did the deceased move very quickly when going towards Mr. Selfridge? *A.* I think he must.

Gore. Was the first blow which you saw struck, on the defendant's head?

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A. It was aimed at the left side of the head, and if it hit at all, must have struck that or the shoulder.

Gore. Have you any doubts that the deceased saw the pistol in the defendant's hand, before it was discharged?

A. It glistened so that I saw it very plainly—the deceased was nearly in the same direction from it that I was.

Att. Gen. Where was the defendant when you first saw him?

A. He was walking slowly from the northeast corner of the old State-house, with his hands behind him.

Att. Gen. Did you see him take his hands from behind him?

A. I did not.

Att. Gen. How long was it after you saw him with his hands behind him before you saw the pistol in his hand?

A. Four or five seconds.

Att. Gen. Where was the deceased?

A. He was advancing very fast towards Mr. Selfridge, with his stick level with his shoulder. When the pistol was discharged, they were so nigh each other, that the stick might reach the defendant.

Att. Gen. Was the first blow as violent as those given afterwards?

A. I thought it was not.

Zadock French—called again.

Gore. After the pistol was fired, was there any thing like scuffling between the parties?

A. After the first blow was given, and the pistol discharged the deceased struck several blows, from three to five—Mr. Selfridge seemed to stand or pause, and finding the blows repeated, he struck at Mr. Austin with his pistol—Mr. Austin made a misstep, and sallied two or three paces down street—Mr. Selfridge threw the pistol at him, but it passed him without hitting him.

Parker J. Had the pistol taken effect before the first blow was given?

A. I did not think at that time that the pistol had taken any effect at all.

Gore. Did you see Mr. Selfridge attempt to take the cane from Mr. Austin?

A. After Mr. Austin had sallied, as I have mentioned, and returned, Mr. Selfridge lifted his hands, and seemed taking hold of the cane. Mr. Austin fell very soon.

Defendant. Did I not retire as I saw Mr. Austin faulter?

A. You did.

Gore. When Mr. Selfridge had hold of the cane, did not Mr. Austin recover it out of his hands with great ease?

A. He did—and fell with it in his hand; he took it with as much ease as a man would from a boy.

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William Fales—Sworn.

Gore. Please to relate to the Court and Jury what you know relative to this transaction.

A. About half past nine o'clock in the morning of the fourth of August, I was walking in State-street, with a friend, and met Charles Austin—He asked us why we had not been to see him lately—I went with him to his father's house, and tarried there until near eleven o'clock, when I left him at home, and went over to Charlestown. Returning a little before one o'clock, I again met the deceased in Court-street, and we went together into Concert-Hall, in company with two other young men who had joined us. One of these was a Mr. Prince, who appeared to be an officer of the navy. Prince and Austin were in conversation about a ball—They had something to drink, but I am not able to say what it was, not having tasted it myself—We tarried but a short time, and Austin and myself left Prince at the hall, and walked up to Judge Donnison's, to see his son—About one o'clock we went down State-street, intending to visit a Mr. Dexter in Broad-street, whom we had engaged to call upon—When we had gone as far as Kilby-street, Austin said he would go no further, and we returned up State-street. Opposite Mr. Townsend's shop we met Mr Horatio Bass, with whom Austin conversed until the affray took place. When Austin left the side walk where we were standing, my back was toward the street. He moved very rapidly—When I turned round, I saw Mr. Selfridge standing with his face towards the Post-Office—Austin was opposite to him with his cane raised—I was greatly confused—I am not able to say whether a blow was actually given before the pistol was discharged or not. I did not see the pistol until it was thrown by the Defendant. After the pistol was fired, I was so much agitated and confused, that I apprehend I cannot relate any thing that passed correctly—I did not see the Defendant's arm extended with the pistol—I saw Austin strike several blows, I think four or five—I cannot say whether the cane, when I first saw it, was descending to give a blow, or ascending after having given one.

Att. Gen. How far asunder were the parties when you first saw them after turning round?

A. I should think three or four feet.

Gore. Did you not go down State-street with the deceased at his desire?

A. We went together in consequence of our having engaged to call on Dexter.

Gore. What did the deceased say to you, while walking down with him, respecting his resenting insults offered to his father?

A. He said that so long as he remained connected with the college, he could not, consistently with that connection, take any notice of the publication of that morning; but that after he left

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college, neither T. O. Selfridge, nor any one else, should asperse his father or his connections with impunity, or words to that effect.

Gore. What cane did the deceased usually carry?

A. A rattan.

Gore. Did you ever before see him with so large a one, as the one he had that day?

A. Not in town; but when he walked to Cambridge, he frequently carried one as large.

Att. Gen. What were the subjects of conversation at Concert-hall, and with Mr. Bass?

A. The conversation at the Hall was respecting a ball, which was contemplated.—He talked with Mr. Bass about his brother.

Att. Gen. Did he seem agitated?

A. He did not—he had a smile on his countenance.

Att. Gen. How old was he?

A. About eighteen.

Att. Gen. Was he considered as a strong young man for his age?

A. He was tall, but not stout; he was not called strong.

Gore. Had he ever been taught to use a cane?

A. Not that I ever knew of.

Gore. Did you hear him in the course of the morning, express any expectations of a rencountre? *A.* I did not.

Horatio Bass—Sworn.

Gore. Please to relate what you saw of this transaction.

A. On the fourth of August, as I was going from the Long Wharf to the Post-Office, I saw the deceased and Mr. Fales standing in front of Mr. Townsend's shop—I shook hands with Mr. Austin and had some conversation with him—soon after this, I saw Mr. Selfridge coming from the north side of the State-house, and Mr. Austin left me, and walked quickly towards him, with his cane lifted.—Selfridge took out his pistol, and shot at Austin—at the same instant Austin was striking Selfridge with his cane.

Gore. Which was first, the blow from the cane, or the discharge of the pistol?

A. It is impossible for me to say.

Gore. What did Mr. Selfridge do, when he first saw Mr. Austin?

A. When I first saw him, he was walking deliberately in a direction towards the Branch Bank, his hands hanging behind him, as I have observed him usually to walk; on seeing Mr. Austin, he faced round towards him.

Gore. Did the first blow hit Mr. Selfridge?

A. I cannot say. After the pistol was discharged, Mr. Austin struck three or four heavy blows, with the cane, and Mr. Selfridge struck two or three times with his pistol at Mr. Austin's face, but I cannot say that he hit him—Mr. Austin sallied, and Mr. Selfridge threw his pistol, which passed on the left side of Mr. Austin without hitting him.

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Att. Gen. How long had you been acquainted with the deceased?

A. I never spoke to him above once or twice before—I saw him the first time at his father's house, by whom I was introduced to him.

John Erving—Sworn.

Gore. Where was you on the fourth of August?

A. I was at No. 1, Suffolk Buildings.

Gore. Please to relate what you saw.

A. I saw Charles Austin and Mr. Fales go down State-street, and very soon after saw them return—I observed Austin to have a stick much larger than he usually walked with—I called a young man from the adjoining room, and soon saw Austin with his cane raised, moving from the side pavement, at a quick pace, but not running, towards Mr. Selfridge, who had his left arm lifted as if to parry a blow—he took a pistol from his right hand pocket and fired under his arm. The first blow and the firing of the pistol seemed to be at the same instant. Austin made a second blow—Selfridge held up his arm to defend his head, and threw his pistol at Austin. At the fourth blow Selfridge caught hold of the stick; Austin recovered it and fell immediately after.

Dexter. Were the blows heavy?

A. They were—the first was a violent one—I do not know what part of Mr. Selfridge any of the blows hit.

William Schaffer—Sworn.

Gore. Did Mr. Charles Austin purchase a cane of you on the fourth of August.

A. About a quarter past ten, he came into my shop, and picked out a cane—he bent it and asked me if it was a strong one, and would stand a good lick—I told him it would.

Gore. Of what wood was it made?

A. It was a good piece of hickory—heavy for hickory.—I told him it was as good one as I had in the shop.

[The stick was handed to the witness, and he declared it to be the same he had sold Mr Charles Austin.]

Gore. What sticks had he usually bought of you?

A. He had usually bought small India joints.

Att. Gen. Did you never sell him any but India joints?

A. Never.

Att. Gen. How long had you sold canes to him?

A. About six months.

Gore. How often had you sold canes to him?

A. As often as once a week, and always small bamboos.

Sol. Gen. Were there any larger sticks in the bundle?

A. There were. The one which Mr. Austin selected, was the second he took hold of.

Lewis Glover—Sworn.

Gore. Please to relate what you know relative to this transaction.

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A. I went into State-Street on the morning of the 4th August, expecting to see something take place. I was standing near the head of Congress-street, in State-street, when Mr. Selfridge came down from his office, in a direction which would have brought him to the Suffolk buildings; when he came opposite Mr. Townsend's shop, a young man stepped quickly off from the side-walk, with his cane lifted; Selfridge had his hands behind him, but suddenly turned; when the deceased came up to Mr. Selfridge, he struck him on his hat—the deceased stepped out very quick, raising his cane as he went along; while he was aiming the second blow, Selfridge presented a pistol and fired it; he afterwards threw away the pistol, while Austin continued striking him.

Parker J. Where was you standing during the transaction; had you a full view of the whole?

A. I had. I stood at fifteen feet distance from the parties, and I kept my eye steadily upon them.

Parker J. Was there a blow struck before the pistol was fired?

A. I am confident there was one blow before the pistol was discharged, and that it was a violent one, sufficient, I should believe, to knock a man down that had no hat on; Mr. Selfridge stepped back one pace, after he had turned, to take a position as it were to fire. Austin struck three or four blows afterwards before the blood issued from his mouth, and fell; I went to his assistance, and with the aid of Mr. Scollay I carried him into Mr. Townsend's shop. Doctor Danforth shortly after came in, and I held the deceased up, took off his neckhandkerchief and hat, and stripped his shirt down to find the wound; Dr. Danforth presently discovered that the person was dead.

Q. How far was you from the Defendant when he fired his pistol?

A. I was not further than from here to the Judge (about fifteen feet.)

Q. How far was you from the parties when the affray began?

A. About as far as from here to the corner window (about thirty feet.)

Gore. Did you go upon 'Change with the expectation of seeing an affray?

A. I went there on purpose to see it, though I own I might have been better employed. I had observed old Mr. Austin to go three or four times up and down the street, and I followed him, expecting that a fracas would take place between him and Mr. Selfridge.

Att. Gen. Were there many people on 'Change at the time this transaction took place?

A. There were a good many about the Suffolk buildings and United States Branch Bank; there were not many near the spot; there were none between me and the parties.

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Q. You say you saw Mr. Austin several times; did you see him after the fact?

A. I saw him several times between eleven and one o'clock—I saw him go into Russell's Insurance Office a little before one: a few minutes after his son's death I saw him pass up the street.

Q. Did you see Selfridge after the affray?

A. I paid no attention to him, though I heard several persons call out to seize him.

Parker J. Were there any words before the blow was struck or the pistol went off?

A. I cannot say that there were any words spoken; if there were, I did not hear them; there was not time for many words—the thing was done instantaneously.

Gore. If any words were spoken, were you in such a situation that you could have heard them?

A. I heard none, for I kept a reasonable distance.

Dexter desired the Sheriff to send for Selfridge's hat into Court.

The hat being produced:

Parker J. Did you observe the hat was broken from the first blow?

A. I cannot say that I did; the whole was in a state of confusion.

John C. Warren—sworn.

Gore. Did you see the blow on Selfridge's head on the evening of the fourth of August?

A. I did. I was called on the evening of that day to visit him. I found a large contusion which he had received on his forehead, about the middle of it; it was three inches in length, two in breadth, and one in depth. It was in my opinion so serious a wound, that I thought it necessary to let blood, which was done that evening.

Q. Was the skin broken through? *A.* No, I think it was not.

Dexter. Was the blow in such a situation on the forehead, that a man with his hat on could possibly have received it, except through his hat?

A. No, he could not; he must have received it through his hat. The skin was not broken, and it was impossible to say what would be the consequence if the hat had been off.

Dexter. If Mr. Selfridge had a hat on must the blow have been struck upon the hat?

A. Yes. The centre of the blow was about the turn of the forehead, part in front and part under the hair.

Dexter. I ask whether if such a blow, given on a man's head without a hat, would probably have fractured his skull?

Att. Gen. I object to this, and ask the Court whether it is proper to put a question for the opinion of a physician?

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Parker J. A physician may, I think, be questioned as to the probable effect of a wound. I understand this to be the practice.

Att. Gen. Is it not more proper for the Jury to draw from the facts what would be the consequence of the blow?

Gore. Every man cannot judge equally for want of anatomical knowledge.

Parker J. I think a physician may declare what in his judgment would be the probable effect of a wound, but not as to the force of a blow.

Dexter. I will submit the fact to the Jury.

Lewis Glover—called again.

Parker J. Was the Defendant's hat on when the deceased struck the first blow? *A.* Yes.

Dexter. Did he strike directly upon the hat? *A.* He did.

Dr. Warren—called again.

Gore. Do you think the blow would have fractured his skull if the hat had been off?

A. I cannot say whether the blow would have fractured the skull or not. It was on a part of the skull that is very liable to be fractured, as the bone is thinner there than in any other part of the skull, and was the hat off it is not unlikely that it would have caused a fracture; but it is impossible to say what would have been the effect.

Parker J. Was the blow directly in the front of the forehead?

A. About the middle of it.

Parker J. You say that the length of the wound was three inches, the breadth two, and the depth one—do you mean by the depth, that the depth of the bruize was an inch below the surface of the skin?

A. The surface of the skin on that part of the forehead where the blow was, is about a quarter of an inch from the bone, the swelling was perhaps more than half an inch; the depth therefore was from the surface of the swelling to the bone near an inch.

Parker J. There was then no wound, but a contusion only?

A. Yes, that is my idea.

Dexter. Was you acquainted with the Defendant at college? Was not you his class-mate? *A.* Yes.

Dexter. What was his habit then as to muscular strength and activity of body?

A. He was very feeble in muscular strength, more so than any young man of his size in the class, he must have been remarkably so, otherwise I should not have recollected the difference.

Dexter. Did he ever engage in any of the athletic exercises or amusements of the college.

A. Never as I recollect.

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Dexter. Do you know of his having lost the use of his limbs, while you was there, by a fit of sickness ?

A. No, I have no knowledge of it.

Dexter. Have you known what was the situation of the wound of which Mr. Austin died ?

A. I have heard my father describe it.

Dexter. I wish to know whether a man having received such a wound which caused his death within five or six minutes, could have sufficient muscular strength to have struck a blow to produce such a wound as that on Mr. Selfridge's forehead, through a thick hat ?

Att. Gen. That is a complex question, and is to be decided rather by opinion than by matter of fact. It contains a perfect argument.

Att. Gen. After a shot had perforated the left lobe of the lungs, would it be possible to give a stronger blow instantly after the wound received than the person could have given before ?

Parker J. Is this not the same question that was asked Dr. Danforth ? all these things are conjectural, and the Jury had better infer them from facts proved.

William Ritchie—Sworn.

Gore. Have you got the hat Mr. Selfridge wore on the fourth of August ? *A.* Yes.

Q. When did you receive the hat ?

A. From Mr. Selfridge in prison.

Gore. (producing the hat.) Is that the hat he had on when the affray took place ?

A. I presume it is ; it has a very similar appearance. When he came into my house the crown was raised up, and it was indented here, and it was broken here, (*pointing to the front of it*) on the edge of the crown in front, so as to see the lining through the aperture.

Gore. [*Shewing the fracture of the hat on the fore part.*] Is not that the fore part of the hat, as this leather [*that on the hinder part*] marks the part of the hat that is worn behind ?

A. Yes, I think it is.

Parker J. I think you observed it was indented on the fore side ?

A. It was also on the back part, but I did not perceive it at the time. I noticed it when it was given to me.

Dexter. You saw the hat broken before Mr. Selfridge left the Exchange, and when he went into your house, did you not ?

A. I saw the hat was broken before we left the street. When he went into my house I took the hat, examined it more particularly, and found it as I have described.

Dexter. Did he not go immediately from the Exchange into your house ? *A.* Yes, he did.

Gore. Be so good as to relate what you know of the whole transaction.

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A. I was standing near the Fire and Marine Insurance Office, with my face down the street, when a pistol went off. On hearing the report, I heard some one exclaim, "Selfridge has shot Austin." I was standing near the gutter looking down the street, and when I heard the pistol discharged, ran to the spot from whence the report came: as I was going to it, I saw the parties engaged. I did not then know it was Mr. Austin. Mr. Selfridge's hands were raised up; but whether to strike or ward off blows I cannot say. When I got up to Mr. Townsend's shop, Mr. Austin had fallen. Mr. Selfridge was standing with his back towards the wall. Some of the people were about taking him. He spread open his arms, and said, four or five times, "I am the man."

Gore. Did any body advise Mr. Selfridge to go off the exchange?

A. Yes, I did. He declined it, and said he would not. I prevailed on him to go about ten paces, when Major Melvill came up to him, and said, that after committing such a deed he ought not to go off. He said he did not mean to: but after some persuasion, I induced him to move a little, but very reluctantly; and when he was as much as ten or eleven feet from the place, he said he would not go away, but would go to my house, and in making that declaration he went off.

Gore. Did Mr. Selfridge desire any one to go to the officers of justice, and inform them where he was to be found?

A. Yes, he did desire some one or other to say that he was gone to my house, and particularly to tell Mr. Bell, the Deputy Sheriff, to come to him. A little before I heard the report of the pistol, I saw Mr. Austin standing with two other young gentlemen, near the door of Mr. Townsend's shop. It was almost a quarter of an hour before.

Sol. Gen. Did Mr. Selfridge appear much agitated when you were endeavouring to persuade him to go off?

A. When I observed to him that he was agitated, he said, "not so much as you are."

Sol. Gen. Did he make use of this observation, that he knew what he had done?

A. Yes, I believe those were the very words.

Sol. Gen. When Mr. Selfridge sent the message to inform Mr. Bell where he was to be found, did you understand the reason of that to have been on account of an engagement to dine?

A. No, I did not so understand at the time. Mr. Selfridge was engaged to dine at Julian's that day with Mr. Bell, as I have since heard.

Sol. Gen. Was the message respecting that engagement?

A. No, to come to my house only.

Att. Gen. Did Bell come?

A. I believe he did; a number of officers came, Hartshorn and others.

Sol. Gen. Is the hat in the same state, as it was when you first saw it?

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A. No t exactly. The top part that is broken, is the same. But the part of the hat that was indented on the fore side then, does not appear so now.

Gore. Did not Mr. Selfridge desire that the people might be told that he was going to your house ? *A.* Yes, he did.

Duncan Ingraham, Esq.—Sworn.

Gore. Did you on the 4th of August, desire Mr. Selfridge to sue out an execution in a suit he had brought for you ?

A. No. It was on the Sunday evening before, on the third, that Mr. Selfridge was at my house in Medford. I desired him to get an execution for me at the clerk's office at Cambridge, on a judgment he had before obtaind for me. It was upon a mortgage of a house in Concord.

Att. Gen. Is this proper ?

Gore. I was going to shew the motive which induced Mr. Selfridge to go on 'Change on the 4th of August ; that it was in consequence of an arrangement with Mr. Ingraham, that he went there with the execution in his pocket, and that Mr. Ingraham went there himself to receive it.

Parker, J. I think this evidence admissible. Proceed.

A. He promised to go to Cambridge for it, and it was agreed that he should give it me on 'Change the next day.

Dexter. Did you go upon the Exchange, to meet Mr. Selfridge there that day ?

A. I went there twice to meet him, once before, and once after the accident.

Parker, J. Do you say it was agreed that Mr. Selfridge should meet you on the Exchange that day ?

A. Yes, it was so agreed, on Sunday night.

Gore. Did you send some one the next day to the prison, to get the Execution ? *A.* No, I never got it, he sent it to an officer.

Att. Gen. Do you know that Mr. Selfridge did take out the execution on Monday morning ?

A. I know nothing about that. I know that when I went the next day to the office, the gentleman said it was there.

Parker, J. I believe that you had better prove this by another person.

Doctor *James Jackson*—sworn.

Gore. Did you see Mr. Selfridge in prison on the evening of the fourth of August ? *A.* Yes.

Gore. Did you examine the wound on his head ? *A.* Yes.

Gore. Describe it and the nature of it.

A. When I saw him it was almost six o'clock in the evening, perhaps towards sun set, four or five hours after the accident. I observed a contusion on the forehead. It was about three inches long, near two wide, and elevated above the surface of the skin about half an inch ; near the centre the skin was broken, and it appeared to me to have been bleeding ; it was not bleeding when I saw it. He complained of great pain in his head generally, not only in the part where he had received the blow, but through the whole head.

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Gore. Was he let blood?

A. Yes—he had also a blow on his arm, but it was not very considerable. Shortly after I thought in his particular situation, it might be important to have his condition stated, and that therefore other physicians should be called in.

Gore. Did you feel his pulse, was there any appearance of a fever? *A.* Yes; a considerable degree.

Parker J. Was the wound so high on the forehead, that if a hat had been on his head, the blow must have struck his hat?

A. Yes; if he had a hat on, it would have covered the part where the blow was received. The highest part of the wound extended a little under the hair. It was oblique upon the front part of the forehead.

Gore. Was there not a question made at that time, whether the skull was or was not fractured?

A. I do not recollect. When I say that, I do not mean that no one examined to ascertain what was the state of the skull.

Gore. I mean whether it was not a subject of consultation?

A. Every man examined for himself, and when they went away there was no doubt that it was not fractured.

Gore. What was the opinion of the physicians at that time, as to the probability of his skull being fractured?

Parker J. That question was put before in another form, and negatived. I thought it improper. The facts relative to the wound should go to the Jury, and the inferences be drawn by them.

Dexter. Is not the human skull thinnest where the wound was?

A. Yes—though the centre of the wound was not exactly on the thinnest part of the skull—the wound covered the thinnest part.

Gore. Do you know any thing of the health and constitution of Mr. Selfridge; are they uncommonly feeble?

A. I have known him some years back, and I know they were very feeble. I have had occasion to know the state of Mr. Selfridge's health for several years past, having attended him professionally. I recollect his telling me about four years ago, that his muscular strength was very little—that he was generally feeble from his having at some former period lost the use of his limbs, and that a boy of fifteen years of age could manage him. I considered therefore his strength in the prescriptions I ordered for him, and from the remarks I have made upon him, I consider his relation of his debility to be true; his mode of walking and general manner of carrying his body, also satisfied me of the truth of his assertions.

Dexter. Did he not consult you about an apprehension he had of loosing the use of his limbs, and some fears he entertained of a very great general debility?

A. He told me as I have mentioned, that he had lost the use of his limbs; but I do not recollect that he expressed any fear of the return of the complaint.

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Gore. Did you see that evening the hat Mr. Selfridge wore on the day he was attacked ?

A. I saw a hat that was shewn to me as the one.

Gore. (*shewing the hat*) Does this appear to you to be the hat ?

A. It has the general appearance of being the same.

Parker J. I do not think that any further testimony is necessary about the hat. Mr, Ritchie's evidence appears to me to be fully sufficient.

Dudley Pickman—Sworn.

Gore. Was you in Mr. Lane's shop on the 4th of August last ?

A. Yes.

Gore. Was you there when the pistol was fired in State-street ?

A. Yes ; I was sitting in the shop with my face towards the street.

Gore. Where was Lane then ; what was his situation

A. He was sitting within his shop with his back towards the inside door when the pistol went off.

Gore. You are positive as to this, that Lane was within the shop ?

A. Yes, I am. The door that leads from the street, leads into Mr. Lane's house. There is a partition with a door that leads into the shop. He was sitting within the shop ; his back was against the door, and one side of him towards the street. When the pistol was heard, I said, "Mr. Lane there is a report of a pistol." He rose up, went to the door, and I followed him.

Parker J. Are you sure that Lane did not rise up 'till after the report of the pistol ?

A. I am positive he did not till after the report.

Gore. Did Lane say any thing at the time ?

A. He made some exclamation about its being a pistol.

Gore. You say that you went out of Lane's shop with him—what was the situation of the parties ?

A. I followed Lane to the door, we went out almost at the very same time, I then saw Mr. Selfridge and another person near the middle of the street, between Mr. Lane's shop and Mr. Townsend's. Mr. Selfridge had his arms raised up to ward off the blows that Austin was giving. The blood was then gushing out of Mr. Austin's mouth. Mr. Selfridge retreated towards Mr. Townsend's shop. The crowd gathered around them, and Austin soon fell.

Gore. You say that Lane and you went out of the door at the same time ?

A. He was between me and the door, and I went out directly at his back.

John Brown—Sworn.

Gore. Did you live with Mr. Selfridge's father ?

A. I lived a near neighbour to him.

Gore. Did you know any thing of his losing the use of his limbs in the early part of his life ?

A. He lost the use of them in a great measure.

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Att. Gen. Before he went to College? *A.* Yes.

Att. Gen. How long? *A.* A Short time.

Gore. Was he not always a feeble and weak young man?

A. As far as I have known him. I have heard him complain of his great weakness, and often express his fears that he should one day or other totally lose the use of his limbs.

Parker J. What was the general appearance of Mr. Selfridge as to strength?

A. He was not called so stout or strong as many.

Parker J. Did he appear as stout and strong as people usually are of his age and make?

A. No. He was freed from military duty in consequence of his infirmity and weakness in his limbs.

Doctor Isaac Rand—Sworn.

Gore. Did you examine the appearance of Mr. Selfridge's head the night of the 4th of August last, after the accident of that day?

A. Yes.

Gore. Will you please to relate the state and condition of it?

A. I was in the evening requested by Dr. Jackson, to visit Mr. Selfridge. I found a large tumour on the left side of the head. It was almost two inches and a half long, one and a half wide, and considerably elevated. He appeared to labour under a considerable acceleration in the circulations—His pulse was hard and quick, so much so that I thought it necessary he should be bled. The operation took place. He said he should faint, the pain in his head was so very violent, he lay down, but immediately rose again, saying he could not lay. His countenance was flushed. The inflammation was so great that it was necessary to apply every method to alleviate it. I did not see him for a fortnight afterwards, the appearance of the wound was not gone, round the part where it was inflamed the discoloration remained, and the tumour was not totally dispersed.

Parker J. You say that a fortnight afterwards there were still visible marks of the blow?

A. Yes, very visible. There was a small fissure in a right line, and the blow not having broken the lower integuments of the head, the contusion was so much the greater: had the skin been broken, the effect on the brain might probably have been less.

Dexter. Had this blow been directly on the skin, would it not have torn the skin?

Att. Gen. Stop.

Parker J. It seems to me these are facts to argue from, and on which the jury will judge.

Dexter. If the blow had been given without the intervention of any substance, is it not highly probable that the skin would have been more lacerated?

A. Certainly; from the appearance of the contusion, it is probable that such a blow might have fractured the skull.

Sol. Gen. Is it your opinion, that after a man has received a

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mortal wound in the lungs, it would have left him the power of muscular action ?

A. I believe that when there is an existing volition for a muscle to act, though a fatal wound be received, yet, that volition existing at the time, and exerting itself on the muscle, would take effect. The muscular power depends on the quantity of blood when a person is in health ; if a diminution of the blood take place, the muscles will be less full, and less extended, their force and power therefore decreased, and as the pulmonary artery must have been injured, a great quantity of blood must have been discharged ; by this the muscular strength must have been reduced : but as this would not operate on the arm till the blood left the muscles there, the blow might not have been impeded by the wound. If the volition was instantaneous or contemporaneous, the stroke would descend with the whole force of the blow ; but if the blow was given three or four seconds after such diminution of blood, he could not have struck with such force.

Dexter. If the party was in the act of striking when he received the fatal shot, would the blow be equally forcible ? *A.* Yes.

Dexter. But if it was a few seconds after it would be less powerful ?

A. After the diminution of blood in the muscles, the blow would become weaker and weaker. A wound sometimes increases muscular action. I have seen persons spring up four or five feet after receiving a mortal wound.

Sol. Gen. Is not that the case of persons who are wounded in the heart ?

A. There is such a sympathy between the heart and the other parts of the human system, that in general there is instant death.

Sol. Gen. Have you not known a person to be wounded in the lungs and yet recover ?

A. I have known a part of one of the lobes to be taken off and yet the patient recover.

Sol. Gen. Might not the immediate cause of the death of Mr. Austin have been the bursting of a blood vessel in consequence of the wound ? If so, might he not have given the blow with his full power ?

A. When a ball passes through a man, it is with such velocity as to cauterize the wound and prevent an instantaneous hæmorrage, so that it does not immediately diminish the muscular strength.

Dexter. Is it not supposed that gun shot wounds usually take place without much pain ? *A.* Yes.

Warren Dutton, Esq.—Sworn.

Gore. Did you see Mr. Selfridge walking down State street, on the morning of the 4th of August last ? *A.* Yes.

Gore. Was it immediately preceding this rencontre ?

A. I presume not one minute before.

Gore. What was the position of his hands ?

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A. I cannot recollect with certainty. It is in my mind, that they were either folded or behind him under his coat. The sun shone in his face, he had his hat over his eyes, and his arms as I think folded behind him. I had hardly turned my eyes from him when I heard the pistol.

Lemuel Shaw, Esq.—Sworn.

Gore. Did you receive an execution from Mr. Selfridge after he was in prison?

A. Yes. I recollect that on Monday the 4th of August, after he was in prison, I inquired of him whether he had any services for me. He said Yes. I called on him the next morning and took from him a writ of possession in favour of Duncan Ingraham Esq. against Oliver Williams of Concord; and he requested me to deliver it to Mr. Ingraham.

Gore. Do you recollect the date of that writ of possession?

A. No, I do not.

Sol. Gen. Did you see the Defendant on the fourth of August before the meeting between him and the deceased?

A. I occupied the same office with Mr. Selfridge. He came to town on that day from Medford, between nine and ten o'clock. He mentioned the subject of his controversy with Mr. Benjamin Austin. The chief that I heard was when Mr. Richardson was present. Being engaged in business, and having known the affair before, I did not pay much attention to the conversation at that time. There was a boy in the office at the time.

Sol. Gen. Did you see any pistol in the office that day?

A. I do not recollect seeing any that day. He had kept for many months before a pair of pistols in an open desk in the office.

Gore. Did he usually carry pistols with him in riding to and from Medford?

A. I do not know that fact, he usually set off for Medford after sun set.

Att. Gen. Was you in the office when he went out to go on change? *A.* Yes.

Gore. Did you go with him?

A. No. I did not go till after I heard the report of the pistol.

Gore. What was the form of the coat Mr. Selfridge had on, was it a fly coat, or a short one?

A. No, it was a common long coat?

Gore. Were the pockets behind?

A. I recollect there was a pocket inside, in which he usually kept his pocket-book, but whether there were other pockets, or whether they were out-side or in-side, I cannot say.

Gore. What is the usual manner of Mr. Selfridge's walking? Is it with his hands behind him?

A I think he generally rests his hands in some way or other; either by folding them before or behind him, or supporting them in the arm-holes of his jacket.

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Sol. Gen. Should you know one of those pistols, if it was shewn to you?

A. I think I should. They were steel barrels—what are generally called screw-barrel pistols.

Sol. Gen. [*Shewing the pistol which Mr. Selfridge had carried*] Is that one of them?

A I think it is—I have no doubt it is one of the same—It is the same sort, but there may be many others of the same kind.

Dexter. Do you recollect this double guard? [*shewing it*]

A. Yes, I do. After hearing the pistol I ran out upon the exchange, and saw Mr. Selfridge. I observed a break in his hat, and saw something through it.

Gore. Was there any more than one pistol at a time in the desk, as you say he had two?

A. I do not know how it was generally.

Gore. Did you frequently see only one?

A I think I have. But I should not very distinctly know, for as the two cases are of woollen, and connected by a string, I should not easily know, unless I took up the cases, whether there were two, or there was only one.

Henry Cabot, Esq.—Sworn.

Gore. Had you any conversation with Mr. Selfridge on the morning of the 4th of August, on the subject of his controversy with Mr. B. Austin? *A.* Yes.

Gore. Please to relate what he told you.

Att. Gen. I must object to evidence as to what the Defendant said to any person respecting this matter, before it took place, unless when his confessions are given in evidence against him, and then what he said at the same time may be inquired of, and shewn in his favour. But to produce his declarations in testimony as to what he said before the fact, to establish the *quo animo*, is not otherwise admissible.

Gore. I will then inquire only what Mr. Cabot told him; which I understand to have been to this effect: that he was that day to be attacked by some one who would be procured or hired to beat him.

Parker J. As the having a pistol, and conversations before the Defendant went on change have been shewn, I do not see but that the Defendant may now shew that it was necessary to put himself upon his guard.

A. In the morning before this affair took place, I notified him that he was to be attacked by a bully hired for the purpose. I drew this inference from a conversation with Mr. Welch.

Att. Gen. I have a motion to make, that this may be considered as a transaction from the 1st day of August, to the day of the affray, &c—it is in writing, and I shall use it bye and bye.

Gore. If you will connect it with what passed in July, I have no objection.

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Att. Gen. I cannot say that I can do that, as I have no knowledge of any transactions in July being connected with that of the 4th of August. But if there be any connexion I have no objection to going back to January.

Parker J. If the evidence offered be as to any information given to the Defendant, of his being about to be attacked, so far as it is necessary to go back for that purpose, I see no impropriety in it. But I cannot permit improper testimony to be given, though it be agreed to by the parties.

Att. Gen. Can we not ask questions, in order to shew that the Defendant did not believe this was a reality?

Parker J. Yes. But as to going back, I do not see where the counsel mean to limit their inquiries. However, it is unnecessary to decide now, how far they may go back. The information of an intended attack, though previous to the affray, may, I think be received.

Att. Gen. How came you by your knowledge?

A. From a conversation with Mr. Welch in the morning. He informed me that Mr. Austin, senior, had said to him that he would have no personal altercation with Mr. Selfridge, but that some one would take him in hand, who was able to handle him. The idea conveyed to me was, that he did not think himself able to contend with Mr. Selfridge, but that he would procure some body nearer his match, or one who was able to cope with him.

Parker J. And this you informed Mr. Selfridge of?

A. Yes, I did. When I told him he was to be attacked by some one, I thought it would be some bully, from my having seen, as I came down the street, a stout, athletic person with a horsewhip in his hand, standing near Mr. Selfridge's office. I mentioned this to Mr. Selfridge, but he said there was no danger of that man, as he was a client of his.

Att. Gen. What did Mr. Selfridge say to this?

A. I do not recollect the expression exactly; but he bowed his head and gave me to understand, that he knew what was to happen, or had been previously notified, or was ready, or something to that effect; I do not recollect the words he used.

John Brooks—Sworn.

Gore. Was you in State-Street on the 4th day of August last.

A. I was.

Gore. Did you see this affray? *A.* A part of it.

Gore. What part? *A.* Nothing 'till after the pistol was fired.

Gore. Did you see Mr. Selfridge before that going down towards the exchange? *A.* Yes, I did.

Gore. How was he walking?

A. Slowly and with his hands hanging loosely behind him, outside of his coat.

Parker J. Did you see his hands? *A.* I did.

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Parker J. Had he a pistol in one? *A.* No, he had not.

Gore. When did you lose sight of him?

A. When he got one third across the street. As long as I saw him, his hands were behind him, and without a pistol.

Mr. French, called again.

Parker J. Have I rightly understood you, that Mr. Selfridge's hands were outside of his coat, and that he took the pistol from his pocket.

A. His right hand was in his pocket; his left hand was held up. I am clear I saw him put his hand in his pocket and take out the pistol

Gore, Before I proceed in the defence, as we have now closed our evidence, I will beg leave to read one or two authorities.

Mr. Gore read from Grotius, book 2, chap. 1 § 3 page 7.

" We have before observed, that if a man is assaulted in such a manner, that his life shall appear in inevitable danger, he may not only make war upon, but very justly *destroy* the aggressor; and from this instance, which every one must allow us, it appears that such a *private* war may be *just* and *lawful;* for it is to be observed, that this *right* or *property* of *self defence* is what *nature* has implanted in every creature, without any regard to the *intention* of the *aggressor;* for if the person be no ways to blame, as for instance, *a soldier upon duty;* or a man that should *mistake me* for *another*, or one *distracted*, or a person in a *dream*, (which may possibly happen) I don't therefore lose that right that I have of *self-defence;* for it is sufficient that I am not obliged to suffer the wrong that he intends me, no more than if it was a man's beast that came to set upon me."

Ibid. § 6. page 10. " But what shall we then say of the danger of *losing a limb*, or a *member?* When a member, especially if one of the *principal*, is of the highest consequence, and even *equal* to *life* itself; and 'tis besides doubtful whether we can *survive* the loss; 'tis certain, if there be no possibility of avoiding the misfortune, the criminal person may be *lawfully* and *instantly* killed."

3. Grotius. chap. 1. §. 2. page 2. " Wherefore, as we have remarked elsewhere, if I cannot otherwise save my life, I may by any force whatever, repel him who attempts it, though perhaps he who does so is not any ways to blame. Because this *right* does not properly arise from the other's *crime*, but from that *prerogative*, with which nature has invested me, of defending myself."

Att. Gen. We have some witnesses to examine in behalf of the Commonwealth, and who we beg may be called.

William Donnison, jun.—Sworn.

Sol. Gen. Relate what you know of this transaction?

A. I do not know any thing of the transaction in State-street; all that I know is as to the circumstances prior to it.

Att. Gen. Do you know whether young Mr. Austin was known to the Defendant or not?

A. Yes. About three weeks or a fortnight previous to the circumstance taking place in State-street, I was walking with Charles Austin down Court-street, near Mr. John Phillips' office. Mr Selfridge met me and inquired respecting my father's health; while I stopped to speak to him, Mr. Austin passed on, and Mr. Selfridge, point-

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ing at him as he left me, asked whether that was not young Austin, or something to that effect, I do not recollect exactly the words, and I replied that it was young Austin.

Att. Gen. Was there nothing more said?

A. That was all. It appeared to me to be a transient question.

Dexter. Was young Austin a likely young man, and any way particularly neat in his dress, so that it would lead any one to ask who he was? *A.* He was always very nice in his person.

Att. Gen. What was his age?

A. About eighteen years old.

Dexter. Was the question asked by Mr. Selfridge of you, "Who is that young man?" or "is that young Austin?" Which of the two questions did Mr. Selfridge ask?

A. I think it was "Is that young Austin?" But cannot be precise that it was. I am not sure which it was.

Sol Gen. Did you see any thing of young Mr. Austin on the 4th of August?

A. I did. About or just after 12 I met him with young Mr. Fales, in Court-Street, near Concert Hall. We concluded to go in, and I sat about a quarter of an hour, and after that, we went to my Father's house, and staid there till about 10 or 15 minutes after one. The bell was ringing for one o'clock while we were standing at the door. He and young Fales went away together, leaving me at home.

Foreman of the Jury. Did you observe that he had a new stick?

A. I did. He told me he had made a purchase of it that morning.

Att. Gen. Did you go down upon change with him? *A.* I did not.

Att. Gen. Had you any conversation with him about the difference between his father and Mr. Selfridge?

A. I think I merely mentioned the circumstance in walking up Cornhill; he seemed to treat it very lightly, and observed, that he could not with propriety resent it while in college, but after he came out of college he would not suffer any thing of the kind to be said with impunity. I think that was all that passed on the subject.

Dexter. Did you not ask him why he bought that stick?

A. No. I knew he had broken his own stick the Saturday before.

Gore. Did you ever see him with so large a stick before?

A. I never did.

The Reverend Charles Lowell—Sworn.

Sol. Gen. Did you see Mr. Charles Austin on the day he died?

A. I believe I did.

Sol. Gen. Where did you see him?

A. I called at the house of Capt. Prince that morning, to inquire after the health of Mrs. Prince, and there met with a young man who was introduced to me as Mr. Austin; I had never seen him before, and I conjectured then that he was the son of Mr. Benja-

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min Austin. I was there about half an hour, and had considerable conversation with him. He appeared to me to be a pleasant young man, and made a favourable impression on my mind.

Sol. Gen. When was this? *A.* About eleven o'clock.

Sol. Gen. Do you recollect whether he had any weapon with him?

A. I remember he had a cane; the reason why I took notice of it was, a young daughter of Capt. Prince's had some conversation with him about the cane, and I believe about some letters on the head of it. I remember only that it was a black one.

Sol. Gen. Did you see or hear any thing at that time about any other weapon, pistol, or any thing else?

A. Nothing at all. I did not see or hear of any other weapon. When I heard of this event, I said I believed this must have been the young man I saw at Capt. Prince's.

Sol Gen. Did he go out and leave you there?

A. I believe I left him there.

Sol. Gen. What time of day was this? *A.* I cannot recollect.

Sol. Gen. Was it about the middle of the day?

A. I should suppose it was a little before noon.

Att. Gen. The evidence we propose now to offer is this:—Its nature and tendency will appear from the motion I now make, which, for the purpose of being explicitly understood, I have reduced to writing, and beg leave to read.

"James Richardson, having, on a cross examination by the Defendant's Counsel, said that the Defendant a few minutes before the fact of killing had said that Austin had abused his professional character by saying that an action he had brought for a tavern keeper against Austin, would not have been brought but for the interference of a damned federal lawyer; that he could prove it to be false, and had him in his power; that he had applied to him, and he had confessed it and refused to publish it; that the advertisement that day published was overpowered by that slander; and having sworn Duncan Ingraham and Lemuel Shaw, to prove the design he went on Change with, and having produced Henry Cabot to prove that he told Selfridge that morning that an attack would be made on him, and having produced Lemuel Shaw to prove that he commonly carried pistols to guard himself when he went out of town:—The Government now offer evidence to prove that this threatening to defend himself was from his unlawful intent to draw the father of the deceased or his family and friends into a mortal combat, with a design to destroy the life of any one who should be so drawn in; that in pursuance of this design he had within a few days previous, on the 1st and 2d of August, sent letters and messages to B. Austin, the father of the deceased, to provoke him to a combat, and that he was under no fear of an assault but what arose from his own seeking, and from what he intended by the advertisement he had published on that day."

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I do not pledge myself that the witnesses will support this to the full extent, but if I did not suppose they would in a great measure, I would not waste the time of the Court in hearing it, nor unless I believed it to be pertinent.

Gore. I do not exactly know from the course this cause has taken, that we ought to object to this motion, because our desire is, if it be consistent with the rules of law, to go into all the anterior circumstances.

Parker J. My own opinion is, that nothing is proper evidence excepting what took place on the same day or very shortly before; and more particularly that any thing which goes to shew a previous quarrel with another person, or even with the same person, is not proper; the law being clear, that no provocation by words will justify blows. It therefore appears to me that this sort of evidence would not be proper. But as the Government, should I so decide, could not have the question revised in case of an acquittal, I do not wish to decide it alone, but am desirous to request the aid of the Chief Justice, who is in town.

Att. Gen. I would wish to hear the opinion of a full Court. If the evidence is admitted wrongfully, the Defendant can have the opinion of the whole Court. But if the Chief Justice should come in, I know not whether, not having heard the antecedent evidence, he would be competent to decide on the admissibility of the evidence proposed by the motion I have submitted.

Parker J. I should not have proposed inviting the Chief Justice to come into Court, had you not stated in your motion all the circumstances on which you ground it.

Gore. I was about remarking what was our peculiar situation: while we have an earnest desire to shew every thing that relates back, and think it had better be admitted, we have had an intimation from the Court, that this would be improper; we will accede to the motion, under this condition, that the Counsel for the Government will not object to what we may adduce. But it seems to be implied by the terms of the motion, that that part of the examination which went to what was prior to, and not a part of this transaction, was introduced by us. That is a mistake.

Att. Gen. I do not say so—if I am mistaken I wish to be corrected.

Gore. The words of the motion are, "that James Richardson, having on a cross examination by the Defendant's Counsel." Every thing that came out was from Richardson, who was called by the Government. He was their witness. We wanted to go into the question, and were not permitted. I mention this merely to rebut the charge of any thing having proceeded from us. We consent that every particular antecedent to the rencounter shall be gone into without keeping back a tittle.

Att. Gen. If the Court are willing to admit the whole I have no objection.

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Parker J. I do not think the Court ought, if it be not admissible, to receive it as legal testimony, although it be so agreed by the counsel on both sides.

Att. Gen. I do not believe it would take up a quarter of an hour, or near so long as debating it. It may however go to the Jury by consent of parties, and I am willing that this motion, as it is on paper, and the evidence in support of it, should afterwards be laid before the whole Court, if the Defendant be found guilty.

Parker J. Do you consent that the evidence shall be gone into? [*to the Defendant's Counsel.*]

Dexter. If the whole of the antecedent circumstances may be gone into; upon that condition.

Att. Gen. I wish to be set right if I am wrong, and as my voice is very feeble, and the gentlemen on the other side are at some distance, I wish also to set them right, for I find that they misunderstand what I say, and therefore I will turn rather more towards them. I wish to be corrected in our facts if they be not so. I have said that "James Richardson having on a cross examination by the Defendant's Counsel." I did not mean this as a charge against them. But I will appeal to the minutes of any person who is taking notes, if all that Richardson said respecting Mr. Selfridge's being the damned federal lawyer did not come from questions put by the Counsel on the other side.

Dexter. You say you wish to be set right, and therefore I only mention that Richardson was called by the Attorney General to testify to the conversation. He did so at the request of the Attorney General, and when cross examined by the Defendant's Counsel they proceeded as to the same conversation. It was to facts which made part of the same conversation that they examined.

Att. Gen. As there is some doubt respecting the right to go into the evidence proposed by the motion, I shall read some authorities which I think pertinent to the question. The first is from 1. East's C. L. p. 239.

"In no case, however, will the plea of provocation avail the party, if it were sought for and induced by his own act, in order to afford him a pretence for wreaking his malice. As, where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him; on which B. strikes A. and A. kills him: this is murder. And in all cases of provocation, in order to extenuate the offence, it must appear that the party killing, acted upon such provocation, and not upon an old grudge; for then it would amount to murder."

I expect by the testimony proposed to shew an old grudge against the father of the deceased; and that the advertisement, from its common and usual effect, which the Defendant published that morning, must have been published with an intention to provoke a quarrel, and that his intention further, in going armed in an unlawful, not to say felonious manner, was, to resent whatever he might conceive to be an injury to his person or character.

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I will now read from 1 Hale's Hist. P. C. p. 457. After speaking of a killing on a sudden provocation, the author proceeds:

"Admitting it would not, in case there had been a striking with such an instrument, as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether this striking,* that was so improbable to cause death, will not alter the case; the Judges were not unanimous in it; and in respect, that the consequence of a resolution on either side was great, it was advised the King should be moved to pardon him; which was accordingly done."

"A. and B. are at some difference, A. bids B. to take a pin out of the sleeve of A. intending thereby to take an occasion to strike or wound B. which B. doth accordingly, and then A. strikes B. whereof he died; this was ruled Murder. 1. Because it was no provocation, when he did it by the consent of A. 2 Because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill B."

The principle is, that when there is a mischievous intention of killing, and in consequence of that a man does a deliberate act with intent to take occasion to kill, it cannot be excusable homicide, but manslaughter, if not murder.

1 Hawk. P. C. B. I. c. 31 § 20. "As to murder in the first sense, such acts as shew a direct and deliberate intent to kill another, as poisoning, stabbing, and such like, are so clearly murder, that I know not any questions relating thereto worth explaining."

"But the cases which have borne dispute, have generally happened in the following instances.—First, in duelling.—Secondly, in killing another without any provocation, or but upon a slight one.—Thirdly, in killing one whom the person killing intended to hurt in the less degree."

Sec 21. "As to the first instance of this kind, it seems agreed, that whenever two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary: For since he deliberately engaged in an act highly unlawful, in defiance of the laws, he must on his peril abide the consequences thereof."

Sec. 22. "And from hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder."

Sec. 23. "And whenever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration, as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c."

* *Throwing a broom staff.*

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It is easy for the Court to see that the defence intended to be set up is, that the Defendant killed the deceased on a sudden provocation; and that it is designed to maintain this on two principles; in the first place, that in all assaults, the person assaulted has a right to kill the assailant: secondly, that if the assault be such as to endanger the party attacked, he is then excusable, and perhaps justifiable in killing in his own defence. This is answered by observing that the excuse or justification of self-defence is taken away from the Defendant when it appears, that he saught the quarrel, and went out expecting it; or that he armed unlawfully, and then did any thing to provoke an affray. Thus far the evidence proposed would shew that the Defendant published an irritating advertisement, in which he called the father of the deceased a liar, scoundrel, and coward. I have to submit it, whether that is not evidence of its being done to provoke a quarrel. Should I be told that it is not to be deemed so, I will desist. But they have proved from the testimony of Mr. Cabot, that he told the Defendant, that he expected Mr. B. Austin was going to get some bully to handle him, probably to chastise him on the Exchange. Then the evidence will shew, that he went on 'Change unusually armed. There may be such a time in which a man may thus arm; but it could not be necessary at noon day, and when going on so public a place. The next evidence is that he expected this combat, not from the father, but from some other person, and went out with an intention to kill such person. I say then that he went out with an unlawful design. They have put it on his going there on a lawful design to deliver an execution to a client, and not with a design to kill; and that the attack on him was a sudden affray, without any fault in him: if that be the point of defence, the Jury have a right to infer from the evidence I propose, that he was the cause of this attack, and that the advertisement was designed to bring on the resentment of Mr. Austin and his family; that he went on 'Change to meet an occasion of quarrelling; this will connect itself with the defence set up, and shew that it is a mere pretence, and that he had other views. For he said to Mr. Welsh that he did expect such a quarrel, and Mr. Welsh had orders for the printers to stop the press, and not to publish the advertisement, if Mr. Austin the elder would make such concessions as the Defendant might require; we shall shew that Austin said he would not, as he had given satisfaction enough. We have proved that Mr. Austin had not said the Defendant was a rascal, for the words are not of that import. We will shew that Mr Austin said he was ready to give full satisfaction to him. If the killing happened from the preceding quarrel, it is not of consequence which was originally to blame. We mean to shew, that this going armed was unlawful, because he provoked the quarrel, and expected it, and that if he had not gone so, this manslaughter would not have been committed. He ought to have demanded sureties of the peace, or he need not have gone out with-

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out taking some friends with him; but to say that he might go at noon day to meet any person who might attack him, having a felonious intention to kill him, and to say that with this previous quarrel it was lawful to go so armed, is more I hope than will ever be said in this Court. All the things I wish to shew, are parts of the case, and tend to prove that the Defendant went on 'Change unlawfully armed, on account of a quarrel of his own seeking, and therefore the loss of life being by his own act, it is not excusable; because if he would excuse himself, it is necessary, as all the authorities say, that he himself had no sort of blame. If this evidence is rejected, there will be no remedy for the Government, but if admitted, there is a remedy for the Defendant, for he may have the opinion of the whole Court whether it was or was not admissible. I further say, that as I suppose, what they wish to offer in evidence, is respecting the suit brought against Mr. B. Austin, as a member of the democratic committee, and his saying that it was occasioned by Mr. Selfridge, or that it would not have been brought, I am willing to let in every thing to that point, and even to admit the facts.

Parker J. Is the admitting this evidence consented to?

Dexter. If the whole transaction can be gone into.

Parker J. How far do you mean to extend it?

Dexter. So far, as to the origin, as to shew that what Mr. Austin said of Mr. Selfridge was not true.

Parker J. I am not inclined to give any opinion on the legality of the testimony, but to admit it, as it does not injure the Defendant.

Att. Gen. That it may be fully judged of, I will file my motion with the Clerk.

Jonathan Hastings, Esquire, Post Master—Sworn.

Sol. Gen. Please to relate what you know relative to the transactions now on trial?

A. About a quarter past one, the deceased came to my office, and inquired if there were any letters for him. There were none. He gave me an invitation to his commencement.

Sol. Gen. Had you seen him before that day? *A.* Yes, I met him in the morning, as I came down to the office, and the only observation I made to him was, that there was a piece in the paper that might be attended with bad consequences, and that people ought to be cautious and guarded in their conduct.

Sol. Gen. What was his answer?

A. He said he hoped they would, I think, and passed on.

Sol. Gen. Did you see Mr. Selfridge after the affray? *A.* I saw him after I heard the pistol discharged. I went to the window and saw a great concourse of people. Mr. Richie had hold of Mr. Selfridge, requesting him to go away.

Sol. Gen. What did he say?

A. He said I am not at all agitated: I am the man.

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Gore. Had the deceased generally letters? did he frequently call at the post office for letters? *A.* Sometimes; though but seldom.

Gore. Do you recollect, whether when you made the observation to Mr. Austin, he did not say something about Mr. Selfridge?

A. No he did not. Mr. Selfridge's name was not mentioned, either in our first or last interview.

Hugh Rogers Kendall—Sworn.

Sol. Gen. State to the Court and Jury what you saw of this transaction.

A. A little past one o'clock, on the fourth of August, I was passing from Congress-street, towards the market; when about the middle of State-street, I heard a pistol go off; turning round, I saw two persons engaged. I knew Mr. Selfridge, his face was towards me; the back of the other was towards me, and I did not know him; he was striking blows at Mr. Selfridge, with a cane. I saw the pistol in Mr. Selfridge's hand, but did not see him throw it. Mr. Austin struck two pretty smart blows; the two or three which he struck afterwards, were pretty faint ones. The cane was then out of my sight. I had lost sight of the pistol before. It appeared to me that the parties were too near each other for them to strike fair blows. The people crowded round them, and they moved towards the side of the street. As Austin fell, it appeared to me, Mr. Selfridge was in the act of striking with his fist. The first idea I had that there had been any thing more than powder in the pistol, arose from my seeing the blood. Mr. Selfridge retired from the crowd, and I saw no more of him.

Israel Eaton Glover—Sworn.

Sol. Gen. How old are you? *A.* I am past thirteen.

Sol. Gen. Have you lived with Mr. Selfridge, in his office?

A. Yes.

Sol. Gen. Did he on the Saturday before this affair send you to buy shot? *A.* He sent me to buy some lead first, but I did not get it. I went back, and there were several persons in the office, Mr. Shaw and Mr. Hayward. He then asked Mr. Shaw how much shot was a pound. He gave me 4½*d.* piece to go and buy some shot.

Sol. Gen. Did you ask him what sort of shot? *A.* Yes.

Sol. Gen. What did he then say? *A.* He said it was no odds what sort.

Sol. Gen. How long was this before night? *A.* It was near night. I went and bought the money's worth at Mr. Odin's shop. It was small shot.

Sol. Gen. Was you in the office on Monday? *A.* Yes.

Sol. Gen. You live with Mr. Selfridge, don't you? *A.* Yes.

Sol. Gen. When did Mr. Selfridge come to town?

A. He came in between 9 and 10 o'clock, and then had a whip in his hand.

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Sol. Gen. Did he commonly go out of town on a Saturday?

A. Yes.

Sol. Gen. Did you see any pistol in his office on the day the accident happened? *A.* Not on that day, but I had before.

Sol. Gen. How long had they been there? *A.* About three or four months; there used to be two of them; for about three or four weeks there was one missing.

Sol. Gen. Do you know what was done with the shot?

A. I saw Mr. Selfridge put it in his pocket.

Sol. Gen. Where did he then go? *A.* I do not know.

Sol. Gen. How long did he stay in his office before he went away, after he had put the shot in his pocket?

A. About half an hour.

Sol. Gen. Do you know whether there was a pistol in his office on Saturday? *A.* No, I did not see one.

Sol. Gen. Where were they kept? *A.* Generally in his desk.

Sol. Gen. Was it open on Saturday?

A. I don't know, I did not mind.

Sol. Gen. How long before, had you seen them there?

A. I do not know.

Sol. Gen. Did you see them within a week or forntight?

A. I believe I did.

Sol. Gen. Did you see them within three days?

A. No, I do not think I did.

Sol. Gen. At what time did you usually go home to dinner?

A. About one o'clock.

Sol. Gen. At what time did you go that day?

A. Just before one.

Sol. Gen. How long?

A. Not more than three or four minutes.

Sol. Gen. Did you stay as late that day as usual?

A. No, there were some gentlemen in the office. I went out and came in again.

Sol. Gen. Do you know whether Mr. Richardson was one of those gentlemen? *A.* No, I do not.

Sol. Gen. How many gentlemen were there?

A. Three or four.

Sol. Gen. What did Mr. Selfridge say to you when you came in again.

A. He said is it not time for you to go to dinner? I said not quite.

Sol. Gen. Did he say it was time; *A.* No, he said you may go. I went out and left those gentlemen there.

Sol. Gen. Was Mr. Welsh one?

A. No. I do not know who they were.

Sol. Gen. Do you know any one that was there?

A. No, I do not.

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Sol. Gen. How much did the shot weigh ?

A. I don't know, there was very little of it.

Att. Gen. How long was you gone before you heard of the affair ?

A. About an hour. I heard of it a little before two, or a little after.

Dexter. Did you not usually go to dinner as soon as that ?

A. No, but near about that time ; one o'clock ; it was that day about 2 or 4 minutes before one.

Dexter. Had Mr. Selfridge usually kept powder in his office ?

A. I think I have seen some there. Some time before that, a man brought some to the office.

Dexter. Did Mr. Selfridge usually put his pistols in the carriage when he went out of town ?

A. Sometimes. I recollect once I put them in the chaise myself.

Dexter. How long before this affair happened ?

A. A great while.

Thomas Welsh, Esquire—Sworn.

Sol. Gen. Be so good as to state what you know relative to this transaction.

A. On Tuesday the 29th of July, Thomas O. Selfridge, Esq. requested me to deliver a letter, of which the following is a copy, to Benjamin Austin, Esq. which I did in the afternoon of that day.

Sol. Gen. Should you know the original if you saw it ?

A. It is very probable.

Sol. Gen. Was it dated 29th of July ? *A.* It was.

Sol. Gen. [*shewing a letter*] Is that the letter ?

A. This is the letter I think.

Parker J. Read the letter.

Welsh reads. *Boston, 29th July*, 1806.

Mr. Benjamin Austin,

Sir——My friend, Mr. Welsh, will deliver you this note, and receive any communication you may see fit to make.

You have to various persons, and at various times and places, alledged, "that I sought Mr. Eager, and solicited him to institute a suit against the Committee (of which you were Chairman) who provided the public dinner on Copp's Hill, on the fourth of July." or language of similar import. As the allegation is utterly false, and if believed, highly derogatory to any gentleman in his professional pursuits, who conducts with fidelity to his clients, integrity to the Courts, and with honour to the bar ; you will have the goodness to do me the justice, forthwith, to enter your protest against the falsehood, and furnish me with the means of giving the same degree of publicity to its retraction, that you have probably given to its propagation. I had hoped the mention of this subject to you yesterday, would have spared me the trouble of this demand ;—that twenty-four hours would have enabled you, without difficulty, to have obtained correct information, as to the fact ; and that a just

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sense of propriety would have led you to make voluntary reparation, where you had been the instrument of injustice:—The contrary, however, impresses me with the idea, that you intended a wanton injury from the beginning, which I never will receive from any man with impunity. I am Sir, your humble serv't

(*Signed*) THO. O. SELFRIDGE.

Mr. Austin, after reading the letter, observed, that he could say nothing further, concerning the thing, than he had done to Mr. Selfridge yesterday; that he had heard the thing from another gentleman, and had mentioned it merely as a report, which he had heard; that he had not mentioned Mr. Selfridge's name; but had merely stated, in the presence of a number of persons, that he had been informed that Mr. Eager had not called upon the Attorney who filled the writ, but that the Attorney had called on him; and he at the same time expressed an opinion that such conduct in an Attorney was disgraceful; he then observed, and repeated it once or twice afterwards, that he would call on the person from whom he had heard the story, and would advise with him whether it was proper that he (Mr. Austin) should give up his name.

The next morning, Mr. Austin met me in the street, observed that he had made inquiry concerning the truth of the report which he had circulated concerning Mr. Selfridge's conduct in Eager's suit against himself and the other gentlemen of the committee; that he was now convinced that the report was false, and that he had been to those persons to whom he had mentioned it, for the purpose of removing the unfavourable impression which such a report, if true, would naturally make upon their minds.—He then observed, that it was not true that he had used Mr. Selfridge's name; that at the time when this conversation took place, he did not know the name of the Attorney; and that this was the only apology that he should make. He also said that he had convinced the person from whom he had received his information concerning Selfridge's conduct in Eager's suit, that the information was incorrect; but did not mention the name of the person from whom he had received it, although I requested him to do it, because he (Mr. Austin) would then be exculpated, and the controversy would be between Mr. Selfridge and Mr. Austin's informant.

Sol. Gen. What did you state to Mr. Selfridge on the 29th of July, when you returned from seeing Mr. Austin?

A. What I have just related.

Sol. Gen. What did he reply?

A. That his name, as he well understood, had been used, and that what Mr. Austin stated was not true. That it had been used to a number of persons, and to more than he had at first conceived. That he had learnt this from a variety of persons since he delivered me the letter. He then requested me to call again on Mr. Austin.

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The same day, July 30th, about 2 o'clock, I called Mr. Austin out of Russell's Insurance Office, and mentioned to him that I had communicated to Mr. Selfridge the conversation of the morning. I then observed to him that Mr. Selfridge was not satisfied with the result of it; that he conceived that he had a right to demand of him the means of counteracting the effects of the falsehood, to which he acknowledged he had given currency. He answered that he entertained a different opinion, and did not conceive that any thing more could reasonably be expected of him. I then observed, that he acknowledged that he had circulated a report highly injurious to Mr. Selfridge's reputation as a lawyer; and that, as upon investigation he had convinced himself of its falsehood, Mr. Selfridge insisted upon an answer to his letter of yesterday, in which should be contained a retraction of the assertion. He said that he could not consent to do this, and that he did not perceive Mr. Selfridge's object in requesting it of him, as he had never mentioned the name of that gentleman, and as he had stated to Mr. Scott, the only person to whom he had related the thing, that he had made inquiry of the truth of the report and was convinced of its falsehood. He then said, that it was impossible that he could have used Mr. Selfridge's name, as he did not know at that time when he had the conversation with Mr. Scott, that Mr. Selfridge was the Attorney who commenced the suit. I then expressed to him my opinion, that Mr. Selfridge ought to be satisfied with the acknowledgment which he had made, were it true that Mr. Selfridge's name had never been used by him, when speaking of this affair; and were it also true that he had declared to the persons to whom he had spoken concerning Mr. Selfridge's conduct in the management of the suit in question, that upon inquiry he found that he had been misinformed, and that Mr. Selfridge's conduct had been correct.

At this moment, Capt Daniel Scott passed out of Russell's Office, and Mr. Austin requested him to step to the place where we were talking, which Capt. Scott did. Mr. Austin inquired of him whether he had used Mr. Selfridge's name, when he mentioned to him the conduct of the "*federal lawyer*" who commenced the suit against the gentlemen of the democratic committee. Mr. Scott answered that he did not. Mr. Scott was then called away by a young man. Upon this I told Mr. Austin I would communicate to Mr. Selfridge the result of our conversation, and left him.

On Thursday the 31st of July, I was prevented by business from calling on Mr. Austin with a letter, of which the following is a copy; and it was not delivered to that gentleman until the next day.

Mr. B. Austin, *July 30th*, 1806.

Sir,——The declarations you have made to Mr. Welsh are jesuitically false, and your concession wholly unsatisfactory.

You ackdowledge to have spread a base falsehood, against my professional reputation. Two alternatives, therefore, present them-

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selves to you; either give me the author's name; or assume it yourself. You call the author a gentleman, and probably a friend; He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen your friend; you must acknowledge it under your own hand; and give me the means of vindicating myself against the effect of you aspersion.

A man, who has been guilty of so gross a violation of truth and honor, as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word, for present indemnity, and future security. The positions I have taken, are too obviously just to admit of any illustration, and there is no ingenuous mind would revolt from a compliance with my requisitions.

I am Sir, your humble serv't.

(*Signed*) THO. O. SELFRIDGE.

As soon as he had read the letter, he observed that he did not expect to hear again from Mr. Selfridge upon this subject; that he had done all that could reasonably be expected from him, in a case of this kind; that after being convinced of the falsehood of the report, which he had circulated, and which he had merely mentioned again, after hearing it from another person, he had been to that person, and satisfied him as to its falsehood, which he likewise had done to all the other persons to whom he had repeated it. He then observed, that Mr. Selfridge was pursuing him in an extraordinary manner, and asked what Mr. Selfridge meant by taking this high ground.

I then answered, that Mr. Selfridge would have been perfectly satisfied with the recantation, which Mr. Austin had declared that he had made, were he convinced that it had been done in a proper manner, and were he not in possession of evidence that he (Mr. Austin) had not only used his name, (Selfridge's) connected with the report complained of, to other persons, but had never seen those persons for the purpose of declaring to them its falsehood. He then repeated that he had never mentioned Mr. Selfridge's name, when speaking of this business; and that he had done every thing that any gentleman would consent to do under similar circumstances.

I then told him that Mr. Selfridge had procured from Mr. Abraham Babcock, a certificate, that he, (Mr. Austin) had told him, that Mr. Selfridge had instigated the suit in question, that Mr. Eager did not apply to Mr. Selfridge, but that Mr. Selfridge had sought Eager; had induced him to commence the suit, and that Mr. Austin had never made any recantation to Mr. Babcock. He then inquired who Mr. Babcock was? I told him he was a friend of Eager, and was the person who had settled the Bill with himself, and the other gentleman of the Democratic Committee; at first, he said that he did not know Babcock, but afterwards he said he recollected him; but made no observations upon what I stated to him, as the contents of Babcock's certificate; he then adverted to the orders, which he pretended were given by Mr. Selfridge to Mr. Hartshorn, the Deputy Sheriff, to arrest him, and the other gen-

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man of the committee, and made use of this circumstance to justify his having spoken the words, at which Mr. Selfridge had taken the exception. I observed to him, that this, if true, would be no justification, and that he had time to convince himself, that it was not true, by applying to Mr. Hartshorn, to whom I had applied, and who had informed me, that he had never received such orders from Mr. Selfridge; and that according to what he had repeatedly stated to me, it was impossible that he should have been induced by any injury, which he supposed Mr. Selfridge had done him in giving such orders, to circulate such a report concerning Mr. Selfridge, because, he had invariably stated *to me*, that at the time the suit was commenced, he was ignorant who the Attorney was. I also stated to him, that Mr. Selfridge was not satisfied with the retraction, if it were true that he had made it, because each of those persons, who had heard Mr. Austin utter the obnoxious words, might have repeated them to many other persons, and that verbal recantations to the persons, who heard them from Mr. Austin, were by no means commensurate with the injury. This conversation was extremely desultory.—Mr. Austin being very much irritated by the contents of the last letter; after he became more calm, I requested him to take the letter into consideration, and give me an answer to it, in the course of the day, he answered that he would have nothing more to do with it. I then told him that Mr. Selfridge was determined to have satisfaction of some kind or other for the injury, which had been done him, and that if he (Mr. Austin) should alter his determination that I should be happy to be notified of it, and be the bearer of any communication satisfactory to Mr. Selfridge; he answered that he would give no further satisfaction whatever.

After I had communicated to Mr. Selfridge, Mr. Austin's refusal to make any further concession, Mr. Selfridge said his only motive in moving in the affair, was to resque his professional conduct from the foul imputation which Mr. Austin had so unjustifiably thrown upon it, and that he would not relinquish the pursuit, till the object was accomplished, but said before he adopted other measures, he would leave Mr. Austin a day or two to reflect, which might induce him to comply with one of the alternatives proposed in his last note. The time elapsed and no proposals were made. From the temper discovered by Mr. Austin in my several interviews with him; but more especially the last—Mr. Selfridge thought any further advances for accommodation were not advisable; and remarked that his means of redress were reduced to a *triple alternative*, a prosecution, chastisement, or posting—A prosecution he said was out of the question, because a legal remedy, from its nature, were it certain in the event, could not be so promptly and efficaciously administered as the degree and kind of injury imperiously required. It would take two or three years to have

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an action decided; but few persons, comparitively, would ever know the result, and those few would be those only, who were conversant with the reporter's volume, and not clients and men of business, from whom he derived his living; that the damage arising to him would be unsusceptible of proof, for it would be impossible to prove who had abstained from employing him professionally, in consequence of the circulation of the report; and while the process was pending, his business would dwindle away, and the cause would be unknown or forgotten, and the permaneney of the evil would remain unrelieved;—from his imbecility, a personal contest, he said, was impracticable; and to rely upon friends for protection, or to permit them to interfere when he commenced the affray, would be an act of cowardice:—that this mode of redress savoured too much of malice and revenge to be compatible with an honourable desire of procuring reparation for an injury; that dog-fighting in the streets, was what he had ever reprobated, and it could have no tendency to disprove to those whose good opinion he was solicitous to retain; a falsehood, the effects of which, if not efficiently resisted, must annihilate his business upon any other suppostion than that the calumny of Mr. Austin could acquire no credit with the public. Posting, therefore, he said was the only remaining alternative. This preventive remedy could be promptly applied to the mischief, and in its operation, would be extensive with all its possible consequences. If one man injure another, no matter from what inducement, and after notice of the injury, and a demand of indemnity, commensurate with the injury, he refused to make satisfaction, having the ability, he leaves the party injured a perfect right to protect himself against all the consequences of an injury, by the surest means in his power; and the severest exercise of this right absolves the party exercising it, from the imputation of malice or revenge; for although the man who committed the original wrong, may suffer, his suffering is merely incidental, and follows from the exercise of a perfect right, which can never be adjudged an immoral invasion of the rights of another, though it may sensibly effect them.

But no man has a right to complain of those consequential sufferings which may be reasonably expected to flow from his own falsehoods or injustice. Mr. Selfridge said, by adopting this measure, the facts alledged by him, if denied, would come fairly before the public, and the infamy of barratrously stirring up law-suits would be justly laid at his door, or transferred to the villain, who engendered the lie, or who screens the liar from his merited deserts.

I did not see Mr. Selfridge on Saturday. On Sunday I was requested by Mr. Cutler, one of the editors of the Boston Gazette, to call at their office, with which I complied;—while there, Mr. Selfridge's advertisement, of the 4th August, was shewn to me; and I was informed that Mr. Selfridge had directed it to be suppressed, in case I should have received any favourable communication

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from Mr. Austin. I told Mr. Cutler that I had not seen Mr. Austin since Friday, and had not received any communication from him since that time. The following is Mr. Selfridge's note of August 4th :

AUSTIN POSTED.

Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct, in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases—I hereby publish said Austin as a COWARD, a LIAR, and a SCOUNDREL ; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof. THOMAS O. SELFRIDGE.

Boston, 4th August.

P. S, The various Editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town.*

Gore. Do you recollect seeing Mr. Austin on the 4th of August ? *A.* Yes.

Gore. Did he not tell you that he would not attack *Mr. Selfridge* himself, but he would find some one that should ?

A. About nine o'clock on Monday morning, the 4th day of August, Mr. Austin met me, and after some immaterial conversation, said "he should not meddle with Selfridge himself, but some person upon a footing with him should take him in hand"—or words to that effect.

After leaving Mr. Austin, I was met by Mr. Henry Cabot, to whom I mentioned the conversation which had just passed between Mr. Austin and myself.

Sol. Gen. Did you see Mr. Selfridge that day before the affair ?

A. I think I did.

Sol. Gen. Did you see him on Saturday ?

A. I believe I did. I do not recollect distinctly.

Sol. Gen. On Sunday ? *A.* I did.

Sol. Gen. Where ? *A.* At Medford.

Gore. During the course of your communications with Mr. Selfridge on this business, did he ever express a vindictive spirit against Mr. Austin ? *A.* He did not.

Gore. Did he express a wish to have this matter accommodated ?

A. Yes, he did : he said he only wished to have that done which would put his character on the same ground as it stood before the report against it.

* Mr. Austin obtained knowledge that he was posted, and published in the Independent Chronicle of the same morning, the following note, viz.

Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day ; if any gentleman is desirous to know the facts, on which his impertinence is founded, any information will be given by me on the subject.

Boston, August 4. BENJAMIN AUSTIN.

☞ *Those who publish Selfridge's statement, are requested to insert the above, and they shall be paid on presenting their bills.*

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Att. Gen. What did Mr. Selfridge say he expected?

A. I always conceived that Mr. Selfridge wished that Mr. Austin should sign something to shew he had circulated a falsehood.

Parker J. Was there any thing drawn up by Mr. Selfridge for Mr. Austin to sign? *A.* I presume not; I never saw any thing.

Gore. Was not that left to you?

A. I presume that if Mr. Austin had consented to sign any thing, what I might have drawn up, would have been satisfactory.

Dexter. Did you ever ask him any thing more, than that he should put on paper that the report was not true? Did you ever ask him to criminate himself? *A.* No, I never did. I only asked him to let me have something in writing, to shew that the story was false.

Dexter. Had not Mr. Austin satisfied himself that the statement he had made was not true? *A.* Yes, as he told me.

Dexter. Did you ask him to do any thing more than put that on paper? *A.* No.

Att. Gen. Did you propose to take a writing that he had heard it from another person, and had found it was not true?

A. There was no question as to the form of the paper, for there was a total refusal to give any thing in writing.

Gore. Do you recollect that Mr. Selfridge told you frequently, that his only wish was to put his character on the same footing as before the report, and that he wished the facts to be stated without criminating any body? *A.* Yes, I do.

Benjamin Austin, Esq.—Sworn.

Att. Gen. Mr. Austin, are the letters which you have heard read, those which Mr. Welsh delivered to you?

A. I heard but one read, and that is the same.

Att. Gen. Is there any thing different from what Mr. Welsh states in the transactions between you and him?

A. Mr. Welsh has made a very lengthy statement; mine will be very shot; if there is any difference the Court will be able to judge of it. I met Mr. Selfridge about the 20th or 22d of July in Court-street: he came up to me, and said, he had understood by Capt. Scott, that I had used his name improperly at Russell's Insurance Office, respecting the action brought by him against the Committe of Arrangements for the dinner on Copp's Hill, on the 4th of July. I replied, that I had never made use of his name, and was surprised that Mr. Scott had said so. As we went down the street, Mr. Selfridge said that it was an injury to his character. I said there was a light conversation with Mr. Scott on the subject, but as I had not used his (Selfridge's) name, so nothing I had said could affect his character, and again expressed my surprise, that Capt. Scott should give such information. I afterwards saw Mr. Scott, and asked him if I had mentioned Mr. Selfridge's name, or hinted in the slightest manner to his person.

I walked on till I came by Mr. Selfridge's office; Mr. Selfridge asked me in. I answered that I was in haste, and did not go in, but again repeated that I had not used his name to any person. On the

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28th or 29th of July, I received by the hands of Mr. Welsh the letter which has just been read. The epithets certainly raised some indignation. When I read it, I told Mr. Welsh that I would go with him to Russell's Insurance Office, and see Mr. Scott. We then went there, and found both Mr. Scott and Mr. Brazer. I asked them whether I had made use of Mr. Selfridge's name or not. They said I had not. I then turned to Mr. Welsh and said, "You find, Sir, Mr. Selfridge is wrong in his information, what more would you have me do?" He appeared to be perfectly satisfied, and I thought the business was ended there. A few days afterwards I received another letter, which was also brought to me by Mr. Welsh. I then told him I was surprised at Mr. Selfridge's pursuing this matter, and asked, what more was wished for? In short no proposition was made. Welsh answered that the contradiction had only been made verbally, and Mr. Selfridge wished me to sign a paper. I told him, I did not know what more I could say, and as to giving any thing in writing, the case did not require it, for I had not mentioned Mr. Selfridge's name, and Mr. Scott and Mr. Brazer had both declared the same thing in presence of Mr. Welsh. On parting, Mr. Welsh asked me what answer I meant to return to Mr. Selfridge. I said I do not know that I can do any thing more. Do you, said he mean to make any further answer. I said, I do not know of any I can make. He went away, and I heard nothing more of the business till I saw the publication in Monday's paper.

Att. Gen. Did you see Mr. Welsh on Monday? *A.* I did. He mentions that I said I would get some person to handle Mr. Selfridge. I said no such thing. I said, Your friend has pursued this matter a great way, and expressed my surprise at the publication in the Gazette. I told him I had put an answer in the Chronicle, and meant to take no further notice of it. I did not tell him that any one else would, for I did not know that any one would. I said, if Mr. Selfridge attacks me, I hope to have such support from friends at hand, as I shall be able to avoid any injury. I had no thoughts of assaulting him.

Att. Gen. Had you ever any intention to employ any person to attack or assault Mr. Selfridge? *A.* I appeal to God, he would have passed me as safely as he stands here at your bar.

Att. Gen. Were you on 'Change on the 4th of August?

A. Yes; I went down about half past 12 o'clock to the Insurance Office.

Att. Gen. Did you know your son was on 'Change?

A. While I was in the Office I saw him go by the window with Mr. Fales, it could not be more than four or five minutes before the event took place.

Att. Gen. Did you expect him there?

A. Quite the reverse. I never said a word to him on the subject of this dispute, or the publication.

Att. Gen. What cane did your son usually walk with?

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A. A small one. I understood that he had bought one that day. But he had one at home, that when he had occasion to go over to Cambridge after it was dark, he used to walk with; it was twice as large, but he left it at home that morning.

Att. Gen. Was it as heavy as that produced? *A.* As much as twice as heavy. He used it when he walked after dark.

Gore. Did not Fales tell you, on the evening of the fatal event, that your son struck Mr. Selfridge one or two blows before the pistol was fired? *A.* Not that I recollect.

Dexter. You mentioned that you were surprised at seeing the publication of Mr. Selfridge in the Monday's paper, and yet put in one in the Chronicle of that day to contradict it: How did you know Mr. Selfridge's advertisement would be put in?

A A boy brought me one of the papers on Sunday evening. I read it, and thought, merely to take off the impression of such a publication, I would put in the note I wrote for the Chronicle, or some such little thing.

Gore. Did not Mr. Welsh tell you that you had not contradicted the report, or the information you had mentioned to Mr. Babcock?

A. Babcock was the first person who told we there had been any application to Eager to commence the suit, and therefore what was said to Babcock was saying no more than he had said himself.

Gore. Did not then this conversation pass between Mr. Babcock and you after what passed between Mr. Welsh and you?

A. I had no cenversation about it, other than merely mentioning to Colonel Gardner, that the story about the lawyer, that was mentioned as having solicited the suit, was not the fact. I went down to contradict it to Mr. Babcock who was present at the same time.

Gore. Mr. Welsh states that Mr. Selfridge had had it certified from Mr. Babcock, that you had mentioned the report to him, and had not contradicted it. Do you recollect any thing about it?

A. All that I mean to say is, that after I found out that the lawyer, whoever he was, did not make the application, I went down to Col. Gardner's and there saw Mr. Babcock, and mentioned to them, that the report was not true.

Gore. Can you account for not mentioning this to Mr. Welsh?

A. I said I had mentioned it generally. The reason why I made the observation as to Mr. Selfridge's conduct, was because I had contradicted it in every circle where I had mentioned it. I had mentioned it but twice, once in the Insurance Office, and once at Col Gardner's. Indeed, he first mentioned it to me there.

Thomas Welsh, Esq. called again.

Gore. I understand you to say, that the denial to Scott, was not satisfactory to Mr. Selfridge, as Mr. Austin had mentioned the report to Mr. Babcock, and had never contradicted it to him.

A. When I called on Mr. Austin the last time, I gave him as a reason for Mr. Selfridge's dissatisfaction, that he had never contradicted the report to Mr. Babcock.

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Gore. Did Mr. Austin ever tell you he had it from Col. Gardner? *A.* I never heard Mr. Austin mention Col. Gardner's name during the whole of our intercourse.

Gore. When you named Mr. Babcock to Mr. Austin, did he say he had notified him of the report being untrue?

A. No, Sir, he said he did not recollect him.

Gore. You hear what he relates as to the conversations with you, are you clear in your recollection of them? *A.* I am very confident, and so is Mr. Cabot, to whom I communicated what passed between Mr. Austin and myself within half a minute after we separated. He is as clear on this point as I am myself.

Thomas Melville, Esq —Sworn.

Sol. Gen. Was you in Mr. Lane's shop at the time this affair took place?

A. I was. The boy had comed and lathered me for shaving when the report of the pistol was heard—Mr. Lane was standing at the street door; I heard the report and asked what it was? Mr. Lane made answer, "It is Mr. Selfridge, he has fired a pistol and he has killed a man." I asked if it was Mr. Austin? Mr. Lane replied "No, it is some young man I do not know, he is a very young man." I went into the street and afterwards saw Mr. Selfridge. I went up to him and tapped him gently on his shoulder, and told him is was reported he had killed a person, and desired him not to go away. He answered me with civility, and said he had no intention of going away. Some one called out loud, (and I am sure it was Maj. Russell,) and said no man had a right to stop him. No person had said at the time that any one had or had not a right to stop him. I said no more.

Parker J. How was you sitting in the shop when you heard the report of the pistol?

A. I sat facing towards the door. I asked Mr. Lane what noise it was, and Mr. Lane answered as I before mentioned.

Dexter. Was it the noise of a blow or a pistol which you heard?

A. I though it was a pistol. I thought so at the moment, and am now perfectly satisfied that it was. I do not know that it is of much importance, but I wish to state one circumstance. It has been said out of doors that Mr. Selfridge was very abusive to me. I must do him the justice to say, that he did not express to me one word out of the way There was another gentleman in the shop with me; I think it was Mr. Pickman of Salem. I feel decided that Mr. Lane was standing at the front door so that he could see the transaction, otherwise I should not have asked him what it was.

Gore. Is the door of Mr. Lane's shop immediately on the street?

A. The street door and the shop door both fall together; so that standing in either he might see directly across the street, but he was outside of the shop door and full in front of the street door.

Henry Flagnor—Sworn.

Sol. Gen. Was you in Mr. Lane's shop at the time referred to?

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A. I was. Mr. Lane was standing at the front door, with his hands behind him; he had been sitting; but before the pistol was fired, he had gone to the door.

[The Counsel for the Government said they should proceed no further at present in producing testimony.]

The following witnesses were called by the Defendant's Counsel.

Daniel Scott—Sworn.

Gore. Please to relate what you heard Mr. B. Austin say about the lawsuit that has been alluded to.

A. He told me that a federal lawyer, who filled the writ against the committee went down several times to the tavern keeper to persuade him to institute a suit against the Committee.

Parker J. Did he state who was the lawyer? *A.* No.

Gore. Did he describe him so that you knew him?

A. Yes, I knew who he meant.

Gore. Did you understand, from what he said at that time, that it was Mr. Selfriege? *A.* Yes.

Parker J. State what he said.

A. A number of gentlemen had questioned Mr. Austin as to the suit commenced against the committee; he said that the federal lawyer who filled the writ had been to the tavern keeper to persuade him to institute the suit; he repeated this observation turning round and speaking at me. I then asked him if he knew the person who filled the writ; he did not state that he knew the person, but said the whole matter would come out by and by; from his manner he gave me to understand, and every one in the office, that it was Mr. Selfridge.

Gore. What did he say that led you to believe it was Mr. Selfridge? *A.* I asked him if he positively knew that the lawyer who filled the writ did personally solicit the suit; he said, "Yes, I do."

Parker J. At any time before, when conversing about this in the presence of Mr. Austin, was it said that Mr. Selfridge had filled the writ? *A.* No, Sir.

Parker J. How did you know that Mr. Selfridge had filled it?

A. I did not know it 'till I communicated it to Mr. Selfridge, which I did from what I then conjectured.

Gore. In any of these conversations, when Mr. Austin was present, had Mr. Selfridge's name been mentioned? *A.* Yes.

Gore. What did Mr. Austin tell you after this?

A. He mentioned that he had received a letter or two from Mr. Selfridge, and should take no notice of them.

Gore. Did he tell you the story was not true about the soliciting the suit? *A.* No, he did not.

Att. Gen. Did he never say to you that he was mistaken?

A. No, he did not.

Dexter. Did you ever ask Mr Austin to let you see those letters? *A.* Yes; he said he had destroyed them.

Parker J. Are you sure he said destroyed, was it not returned?

A. No, Sir, it was destroyed.

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Abraham Babcock, ſworn.

Mr. Gore. Pleaſe to relate what has paſſed between you and Mr. Benjamin Auſtin, relating to the lawſuit that has been mentioned.

Witneſs. On the 28th of July, I met Mr. Auſtin in Court Street, and told him I was deſired by Mr. Eager to ſettle for his bill of the Fourth of July dinner. Mr. Auſtin deſired me to go to Col. Gardner, and agree with him what ſhould be paid for the dinner. I did ſo, and we agreed. I afterwards told Mr. Auſtin of this; he ſaid he was glad of it, and told me that Dr. Noyes would pay me the money. He inquired of me how Mr. Selfridge came to be employed in this buſineſs. I told him I did not know. He replied, that he ſought it, or went after it, I ca..'t ſay which expreſſion he uſed. I went directly to Mr. Selfridge's office, and informed him that the action was ſettled. He ſaid he was glad of it. He then obſerved, Mr. Auſtin ſays I went after this buſineſs. I anſwered, yes, he has juſt told me ſo. Mr. Selfridge aſked me to give him this in writing, which I declined doing; he made a minute of it himſelf; Mr. Welſh was preſent in the office. Afterwards I met with Mr. Auſtin in Col. Gardner's office. He inquired of me what he had ſaid to me in the ſtreet; I related it to him; he ſaid, if the ſtory was not true, he had been wrongly informed. He ſaid it aroſe from what he had heard from Col. Gardner, as he ſuppoſed.

Dexter. When was this laſt converſation?

Witneſs. It was ſometime in the week before the affray, but I cannot tell what day it was.

Deacon Warren, (called by the Counſel for the Government) ſworn.

Sol. Gen. Pleaſe to relate what you ſaw of the affair on the 4th of Auguſt.

Witneſs. I was in the ſtreet, but ſaw nothing before the piſtol was diſcharged. On hearing that I turned round, and ſaw the young man ſtrike Mr. Selfridge ſeveral ſtrokes with his cane. I afterwards heard Mr. Selfridge ſay he was not going to leave the ground; he was ready to anſwer for what he had done.

Nathaniel P. Ruſſell, (called by the Defendant's Counſel) ſworn.

Gore. Pleaſe to relate what you heard Mr. Benjamin Auſtin ſay in your office reſpecting the lawſuit?

Witneſs. I heard him ſay that the action againſt the committee was commenced by a federal lawyer at his own ſolicitation. He did not mention the name of the lawyer, but I was led from what he did ſay, to think it was Mr. Selfridge that was meant. I do not know that I heard him mention it more than once. There were a number of gentlemen in the office at the time.

Gore. Did you ever hear Mr. Auſtin contradict this?

Witneſs. Never.

Daniel Scott called.

Gore. When Mr. Auſtin told you this thing, did he ſay it in a light or trifling manner?

Witneſs. He did not.

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M. Carrol. I live in Flag alley, close by the market; I was opposite to the Post office, where I went to obtain a small balance of 3 dolls. 36 cents. I heard a pistol fired behind me; and I ran round to see what had happened. I was in my shirt sleeves. I saw Selfridge and Ritchie together; Ritchie said to Selfridge, that he was extremely agitated; to which Selfridge replied—I am not agitated. I have done what I intended to do—or meant to do.

Benjamin Austin, Esq. called.

Att. Gen. Did you ever tell any one that you had destroyed the letters received from Mr. Selfridge, by the hand of Mr. Welsh?

Witness. I never did. The gentlemen here must know I could not have said so, the letters being in court now.

Att. Gen. Have you ever contradicted the story about the federal lawyer?

Witness. I went to the insurance office, and there made a declaration that I had been misinformed as to the circumstance. I asked Mr. Scott if I had used Selfridge's name; he told me I had not. In short, I cannot remember every particular, so many distressing circumstances have happened to affect my mind since, that it is not surprising I should forget.

John Osborn, sworn in behalf of the Defendant.

Gore. Was you at Mr. Benjamin Austin's on the evening of the 4th of August? A. Yes.

Gore. Was young Mr. Fales there? A. Yes.

Gore. Did he make any relation to Mr. Austin as to what took place in State Street? A. Yes. Some gentlemen asked him whether young Mr. Austin struck before the pistol was discharged. Mr. Fales said, that he was in State Street with Mr. Austin, and some other gentlemen, and on a sudden young Austin stepped from them; that he then turned round, and saw Mr. Austin strike Mr. Selfridge one blow, and then the pistol was discharged. He said also, that Mr. Austin struck several blows after the pistol was discharged.

Gore. Was Mr. Benj. Austin present at that time? A. He was.

Gore. Was he attentive to this conversation? A. Yes, and asked many particulars.

Gore. Was it Mr. Benjamin Austin that made these inquiries to which the answers were given? A. Yes; he was asking many particulars, and seemed very much agitated.

Gore. Was this statement deliberately made, and more than once? A. I do not recollect that it was more than once. I was there only a few minutes.

Perkins Nichols—sworn, in behalf of the Defendant.

Gore. Was you at Mr. Austin's on the evening of the 4th of August? A. Yes.

Gore. Did you hear any conversation between him and Mr. Fales? A. I did.

Gore. Please to relate it. A. I heard Mr. Fales, among other things, say to Mr. Austin, that he went down Cornhill with his son

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that day; his ſon ſaid to him "I muſt be in State Street;" that he, Fales, ſaid to him "you had better not go, but had better go home with me;" that he urged him to give up his cane to him; but that he refuſed; that they turned down State Street together; that he ſaw Selfridge before Auſtin came up to him; that Auſtin went with his cane up, and ſtruck him one blow over the head; that Selfridge made a pauſe, and then drew his piſtol from his pocket and fired it; that when the piſtol went off, Auſtin was ſtriking a ſecond blow.

Gore. Do you recollect that he ſaid the diſcharge of the piſtol was at the time of the ſecond blow? A. Moſt perfectly; that he ſtruck ſeveral blows after the diſcharge of the piſtol.

Dexter. Were you ſo attentive as to make a memorandum of it in writing? A. Yes.

Att. Gen. What induced you to make it? A. I thought that I might at ſome time be called on as an evidence, and I wiſhed to have it to refreſh my mind.

John Parkman—ſworn.

Gore. Pleaſe to ſtate what you heard Wm. Fales ſay after the death of Charles Auſtin.

Witneſs. About five minutes after the event, I was ſtanding in State Street with ſeveral other perſons. Mr. Fales came up to us, and one of us aſked him if the piſtol was fired before any blow was given. He ſaid it was not; there was one blow firſt.

Gore. Are you certain of the anſwer? A. Yes, I am. He was a good deal agitated. Some days after I converſed with him, but he ſaid he could not recollect at that time how the facts were.

William Fales called by the Attorney General.

Att. Gen. You have heard this teſtimony, what will you ſay of it?

Witneſs. I believe Mr. Parkman's relation is pretty correct. I think I told him, at the time he alludes to, that Auſtin ſtruck a blow before the piſtol was fired. I do not recollect ſeeing thoſe gentlemen at Mr. Auſtin's houſe in the evening. I was very much confuſed and agitated that evening.

Att. Gen. What do you ſay now as to the fact?

Witneſs. For three or four days after the event, I thought of the ſubject anxiouſly, and endeavoured to recollect the circumſtances; I then wrote them down as correctly as I could. I am not able now to ſay whether a blow was given before the piſtol was fired or not. What I have related is according to my beſt recollection and belief.

Att. Gen. Who adviſed you to write down the account?

Witneſs. Several of Mr. Selfridge's friends; I remember particularly Major Ruſſell adviſed me; none of Mr. Auſtin's friends did.

James T. Auſtin, Eſq. (called by the Government's Counſel) ſworn.

Sol. Gen. Was you at Mr. Benjamin Auſtin's in the evening of the 4th of Auguſt?

Witneſs. I was. Every thing was in great confuſion; Mr. Fales was much agitated, and we could get no diſtinct account from him.

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I remember he said the deceased struck three or four blows, but I have no recollection of any discrimination being made between blows before and after the pistol was discharged.

Joseph Wiggin, (called by the Counsel for the Defendant) sworn.

Gore. Please to relate what circumstances you observed in State Street on the 4th of August.

Witness. About five minutes after one o'clock I left my store and went on 'Change; there I saw the deceased with a cane; he seemed uneasy. I saw Mr. Selfridge coming from the corner of the State House, and turned round to see if Austin had moved from his place, and found he had. At that moment I heard a sound as of a stroke of a stick on a coat. Casting my eye round, I then saw Mr. Selfridge present his pistol, stepping back one step, and fire. At the same instant Austin was striking a blow; he afterwards struck two or three strokes more.

Foreman. How far was you from the place where the parties stood?

Witness. About two rods; I cannot say exactly, but near enough to see Mr. Selfridge move his foot.

James Cutler, (called by the Attorney General) sworn.

Att. Gen. [*Shewing the witness the Gazette of the 4th of August*] Was that paper printed in your office?

Witness. It was.

Att. Gen. At whose request did you print this Note, "Austin posted"?

Witness. At the request and on the account of Mr. Selfridge.

[Here the Attorney General read from the Gazette the following Advertisement, viz.]

"*AUSTIN POSTED.*

"Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct, in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases—I hereby publish said Austin as a coward, a liar, and a scoundrel; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof. THOMAS O. SELFRIDGE.

Boston, 4th August.

"P. S. The various Editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town."

Dexter. What directions did Mr. Selfridge give you when he gave you the note?

Witness. In the course of the Saturday before, he told me he expected to be under the necessity of putting a piece in our Monday's paper. In the evening he shewed me the piece. I hesitated about publishing it. He related to me the circumstances of the dispute; said he could obtain no satisfaction; expressed his regret at being reduced to the necessity of such a measure, and wished the printing de-

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layed to the laſt moment ; deſired it might not be printed, until we ſhould have ſeen his friend Mr. Welſh. On Sunday I called on Mr. Welſh ; he told me nothing had been done, and he gave me no directions to omit printing the note.

Ephraim French, (called by the counſel for the Government—ſworn.

Sol. Gen. Pleaſe to relate what you know of the tranſactions in State Street, on the fourth of Auguſt.

Witneſs. About one o'clock I was in Mr. Townſend's ſhop, and ſeeing old Mr. Auſtin go down, expected a ſquabble. I ſaw two young gentlemen go down ſtreet, and preſently return. Mr. Bailey ſaid one of them was young Mr. Auſtin. I ſaw Mr. Selfridge coming from the corner of the State Houſe ; he walked very deliberately, and looked ſober. Young Auſtin went from near where I was ſtanding, towards Mr. Selfridge. As he advanced, I ſaw the piſtol go off, and Auſtin ſtruck ſeveral ſevere blows, and then fell near my feet. I ſhould ſay, that the piſtol, according to my obſervation, was one or two ſeconds before the firſt blow was ſtruck. I did not ſee any cane raiſed before the piſtol went off. I looked particularly at Mr. Selfridge from the time he came in ſight. After he had diſcharged the piſtol, he held up his arms to defend his head from the blows, and afterwards threw his piſtol. No perſon ſtood between me and the parties, ſo that I ſaw them very diſtinctly, having gone out of the ſhop and ſtood on the ſidewalk by Mr. Townſend's ſhop before they met.

Eber Eager (called by the Defendant's counſel)—ſworn.

Gore. Pleaſe to relate what was Mr. Selfridge's conduct in relation to your ſuit againſt the committee.

Witneſs. I ſaw Mr. Selfridge paſſing the ſtreet ; told him I was the landlord that provided the dinner on Copps' Hill, the 4th of July, and wanted him to ſue the committee for my bill. I told him I would give him a five dollar bill to undertake it. Mr. Clough was to explain the whole to him. I afterwards called at his office, he told me he was ſatisfied that I could ſupport an action, but wiſhed it to reſt a few days. I went to ſee him at Medford ; he was diſcouraging in his diſcourſe ; talked about law ſuits being long, and in that way. I aſked him what I ſhould do for money ; requeſted him to advance me ſome on account of this demand, and told him I was willing to take three hundred dollars in caſh, for the whole account, rather than wait. He refuſed to have any thing to do in this way ; ſaid it would be diſhonourable to him in his profeſſion ; that no honeſt man as a lawyer would do it. He told me he would not work *cheap*. His fee was twenty-five dollars. I told him to go on with it. My whole bill was ſix hundred and thirty dollars. They offered me at one time, three hundred and ſixty dollars ; but afterwards they told me they would have nothing to do with it.

Dexter. Did you offer him the half ?

A. No—I offered to take 300 dolls.

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Dexter. What was the amount of your bill? *A.* It was 630 dolls.

Att. Gen. They offered you 360 dolls.—why did you not take it?

A. I would not take it then, becauſe I thought I could get the whole; but afterwards finding it was not to be obtained, but by a ſuit at law, I offered him the half. I certainly wiſhed to have a part, rather than loſe the whole.

Parker, J. This was then ſettled as a point of honour, between the Committee and yourſelf.

Att. Gen. This queſtion has no bearing on the iſſue. I have aſked it merely to know whether the witneſs has acted from himſelf.

Gore. Before I proceed, I ſhall beg leave to read a few ſentences from Grotius.

No man is permitted to deſtroy another except in defence of that which if once loſt is irrecoverable for ever, as life and chaſtity. 2 *Grotius*, 19.

If a man is aſſaulted in ſuch a manner that his life ſhall appear in inevitable danger, he may not only make war upon, but very juſtly deſtroy the aggreſſor; and from this inſtance which every one muſt allow us, it appears that ſuch a private war may be juſt and lawful; for it is to be obſerved that this right or property of ſelf defence is what nature has implanted in every creature, without any regard to the intention of the aggreſſors. 2 *Gro.* 7.

What ſhall we then ſay of the danger of loſing a limb, or a member?—when a member, eſpecially if one of the principal, is of the higheſt conſequence, and even equal to life itſelf; and it is beſides doubtful whether we can ſurvive the loſs; it is certain if there be no poſſibility of avoiding the misfortune, the criminal perſon may be lawfully and inſtantly killed. 2 *Gro.* 10.

So is he reputed innocent by the laws of all known nations, who by arms defends himſelf againſt him that aſſaults his life which ſo manifeſt a conſent is a plain teſtimony that there is nothing in it contrary to the law of nature.—1 *Gro.* 117.

If I cannot otherwiſe ſave my life, I may by any force whatever, repel him who attempts it, though perhaps he who does ſo is not any ways to blame.—Becauſe this *right* does not properly ariſe from the other's *crime*, but from that prerogative with which nature has inveſted me, of defending myſelf. 3 *Gro.* 2

Mr. Gore then proceeded in the following manner:

May it pleaſe your Honour, and you Gentlemen of the Jury,

After having made a few preliminary obſervations, which I thought pertinent, merely with a view to placing you in a ſituation, in which I preſume you are diſpoſed to be placed, that of being free from every bias or prejudice; and I, in the like manner, wiſh to be heard, as the Attorney General ſaid he was diſpoſed to be heard, that is, as if this were a cauſe between two indifferent perſons, of whom you know nothing; for that I preſume to be the very eſſence of juſtice; and if it were poſſible that a Court and Jury ſhould ever decide the ſuit before them, abſtracted from the parties, and merely by fictitious names, we ſhould have deciſions more correct than we now have; not that I mean to find fault with our own juriſprudence, *or the organization of our Courts*, but it is ſometimes impoſſible to be unaffected by the parties, who are to be benefited or to ſuffer. It was

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therefore that I took the liberty to remark on the danger of prejudice, and to illuſtrate it by propoſitions ſo ſimple and plain, that they would receive the aſſent not only of the minds to which directed, but of every human being to whom they could be addreſſed. The conſequences, that followed were ſo natural and neceſſary, that they could not be miſtaken, and I did flatter myſelf, and I do flatter myſelf that they apply to the cauſe I now defend.

Having ſtated the law, from the ſeveral authorities, which I have read, in ſupport of the principles I laid down, I went into the examination of the evidence, and you have heard it with an attention and patience, which will enable you to determine this iſſue, according to the dictates of impartial juſtice.

This is a day of anxiety and ſolicitude to my client, and of intereſt to his counſel; yet I can ſay that to him it is a day of humble hope and tranquillity; a day of firm confidence in the truth and juſtice of his caſe, for it is on theſe that he muſt depend for his acquittal, and on theſe alone does he wiſh to depend. I ſhould ſay, this was to him a day, not only of conſolation, but of joy, if joy could be preſumed to enter the heart of a man who for more than four months has been immured within the damp and unwholeſome walls of a priſon, when his conſtitution demanded free and open air; who required liberty for the diſcharge of the uſual duties of life; who felt himſelf at that time ſubject to the moſt unfounded calumny, yet would not, from his reſpect to the laws of his country, reply; for though he could have replied, he did not. No ſpeeches were made, no obſervations were addreſſed to the public, except to requeſt that they would not prejudge his cauſe, but wait patiently for the time when he might have it in his power to ſtate fairly to the world, the law and facts of his caſe; when he would put himſelf on trial by his country, which country, you, Gentlemen of the Jury, are; and it is now on that law and on thoſe facts, as they ſhall be laid before you, that he is willing to depend for his acquittal. With reſpect to the law, it is my duty, and I have no diſpoſition to go beyond it, to ſtate the principles, as they have been read to you from the books; to aſcertain what it, is in this caſe, and when that is done, to ſtate the facts, that you may apply the one to the other, and come to a juſt iſſue. The law I read to you, is not of this day; it is not novel, or of recent date. It is older than any of us, older than ſociety, old as nature herſelf. It is founded in nature and in the principles of ſociety, and, without it man could not exiſt.

Of the authorities that were read, one of the firſt was from Lord Coke, who ſays, that if A. aſſault B. ſo fiercely and violently, and in ſuch place and in ſuch a manner, that if he ſhould give back he ſhould be in danger of his life, B. may defend himſelf, and if in that defence he killeth A. it is *ſe defendendo*, becauſe it is not done *felleo animo*. The rule is, *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur*. That is, whatever a man does in preſervation of his perſon he

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does not do feloniouſly. This I take to be the ſenſe of the doctrine laid down by Lord Coke.

I took the liberty of reading another authority from Grotius; one of the firſt and brighteſt ornaments of the age in which he lived, who has done more for civilizing and humanizing the world, than any author who ever wrote; who has written more forcibly and effectually on the rights of man and in ſupport of the religion of Jeſus, than perhaps any divine, however celebrated. What ſays he? He ſays that if a perſon be in danger of life, or loſing a limb, or a member, eſpecially one of the higheſt conſequence, and it be even doubtful if he can ſurvive the loſs, and there be no probability of avoiding it, the criminal perſon may be lawfully and *inſtantly* ſlain.

We then come to Judge Foſter, one of the ableſt Judges that ever ſat on a Britiſh bench: He tells you, that the injured party may repel force with force, in defence of his perſon, habitation, or property, againſt one who manifeſtly endeavours, with violence and ſurpriſe, to commit a known felony upon either: in theſe caſes, he is not obliged to *retreat*, but may *purſue* his adverſary, till he find himſelf out of danger; and if in the conflict he happen to kill, ſuch killing is in juſtifiable ſelf defence.

You have the ſame doctrine laid down by Lord Hale, who was one of the beſt and moſt humane of Judges, as well as one of the moſt devout chriſtians that ever appeared. Both he and Hawkins ſupport the ſame doctrine; and in Hawkins it is further ſaid, if the party aſſaulted can not conveniently and *ſafely* retreat, and if he kill the aſſailant to avoid this *beating*, it is juſtifiable homicide. This is the law from thoſe writers.

The next is Blackſtone, whoſe doctrines have never been controverted. He tells you, that the party aſſaulted muſt flee, as far as the fierceneſs of the aſſault will permit him, for it may be ſo fierce as not to allow him to yield a ſtep without manifeſt danger of his life, or *enormous bodily harm*, and then in *his defence* he may kill his aſſailant. He does not put it on the queſtion of life being in danger, but ſays, that where a man is in danger of any enormous bodily harm, he is not to wait till the caſe has happened, but has a right to kill his aſſailant. This forms the law of juſtifiable homicide, and is the doctrine of univerſal juſtice, as well as of our municipal law.

Thus, Gentleman, I have ſhewn from the books, the principles that govern in relation to juſtifiable homicide. I will now read one or two caſes which more perfectly eſtabliſh this doctrine, and ſhew what is the nature of the aſſault, that juſtifies the aſſaulted in taking the life of the aſſailant.

In Maugridge's caſe, who upon words of anger between him and a Mr. Cope, threw a bottle with great violence at the head of the latter, and immediately drew his ſword, on which Mr. Cope returned a bottle with equal violence, Lord Holt ſays, it was lawful for Mr. Cope ſo to do, for he who hath ſhewn that he hath malice againſt

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another is not fit to be trusted with a dangerous weapon in his hand; and he adds it was reasonable for Mr. Cope to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life.

It appears to me that this case justifies him who shall kill, where a weapon is used which would endanger his life, though it have not the effect; and that the person assaulted has a right to attempt the destruction of the assailant, that he himself might not be destroyed. You there have the particular case. This case will depend on the law of excusable homicide. It therefore is not necessary to have recourse to such as are so strong as that I have read. The law says, that if there be reasonable ground to suspect that life is in danger, a man shall be excused, if he exercise the right nature has given him to destroy and take away the life of him, by whom his own has been endangered.

As to *Nailer's* case, I do not mean to contradict it, any further than it is contradicted by the doctrine I state. You recollect, Gentlemen, that it was the case, where, a son in consequence of hearing a scuffle between his father and brother rose from his bed, threw his brother on the ground, fell upon him and beat him; that while in this situation, he who was undermost, not being able to escape or avoid the blows he received, gave his brother a mortal wound with a penknife. This was ruled to be manslaughter, because the prisoner was, in the first place, in the wrong, as much so as any man can be who offends against the law of society and of nature by fighting with his father; and further, because he was not necessitated from the attack of his brother, which brother was without any weapon in his hand, to have recourse to such violent means for defence; because also he was in a wrong act, and then made use of a mischievous weapon. For, says the book, from the manner in which he was attacked, there was no reason to believe his life was in danger. But had he been attacked by a dangerous weapon, then he would have been clear of crime. The law will not countenance a man in destroying his assailant, unless there be a reasonable ground to believe that his life or person is in imminent danger; and whether it be so or not, may be determined from the circumstance of the weapon, whether it appeared to be such a one, with which life might be destroyed.

On this apparency of intent and reasonable ground of apprehension that life was in danger, was determined the case of the servant, who, coming up, found his master robbed and slain, and instantly killed the murderer. Although not attacked himself, yet on account of the apprehension which it was supposed he might be under of being attacked, and his own life put in danger, it was held, excusable homicide.

That is the principle on which some writers defend the authority given by the law of destroying the robber who demands your purse;

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because the same man who comes to rob, would, if necessary for his purpose, take your life.

Further, if an officer, going to arrest a man in civil suit, break into a house, which he is not justifiable in doing, and the person within kill him, knowing him to be a bailiff, it is manslaughter; but, adds the authority, if he had not known him to be a civil officer, the breaking in would have afforded a reasonable ground of suspicion that it was done with a felonious intent, and of course excusable homicide.

There was another case read to you which it is important perhaps to notice. It is that of the officer who entered the chamber of a gentleman who was in bed, on which he sprang out of bed, seized a sword, and ran the officer through the body. This was determined to be manslaughter. Because he did not use sufficient caution, and because the officer had no weapon in his hand, for had there been any, that circumstance might have led the gentleman to think there was a felonious intent in entering his room, and then it would have been excusable homicide.

It will be important, Gentlemen of the Jury, for you to keep these doctrines in your minds, when you come to consider this case on the evidence. It will be incumbent on you further to recollect the decision of Maugridge's case as to excusable homicide, as distinguished from manslaughter. If I recollect aright, the true criterion between homicide in chance medley upon self-defence, and manslaughter is, where both parties are actually fighting at the time when the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer *had not begun to fight*, or, having begun, had endeavoured to decline any further struggle, and afterwards, being closely pressed by his adversary, kill him to avoid his own destruction, this is homicide, excusable in his own defence. Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this, that in the one is an *apparent necessity* for *self-preservation*, to kill the aggressor; in the other there is no *necessity* at all, being only a sudden act of revenge, and then it is manslaughter.

This distinction I wish you, Gentlemen, to keep in your minds when you come to examine this particular case.

Having stated the law as I conceive it to be, as, on reflection, it will be found to be supported by the books, which have been read, and as it will I presume, be given to you by the Court, I now come to state the facts, for it is my duty, only to state the facts, as they have appeared in evidence, without arguing upon them.

In doing this, although I do not mean to go into a critical examination of the testimony you have heard from some of the witnesses, not in the least to question their veracity, yet there is a fitness and propriety that some of them should be laid out of the way. I mean Mr. Lane. And though I have not the slightest intention of impeaching his character, yet it is manifest from the whole current of

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the testimony delivered, that Mr. Pickman must have been right, and Mr. Lane, as well as the other witnesses who were examined in support of his evidence, mistaken. Because Mr Lane says, that the transactions, he attested to were on the brick pavement; when all the other witnesses, as well as Mr. Pickman, who was with him, say the scene was in the middle of the street. I shall say no more on this point. It would be wasting time to suppose you can attach the least weight to the testimony of Mr. Lane. On that of Mr. Howe, I have only to beg you will compare it with that of the other witnesses; because, as the first time he saw the parties together, was when they were on the brick pavement, he could not have seen the first blow and the earlier parts of the transaction; he could not have witnessed all those ingredients, which go to enable you to make a just conclusion from the whole; he could not have seen those circumstances, which took place before the firing.

On the previous circumstances that have been detailed to you, I mean the misunderstandings that took place between the Defendant and Mr. Benjamin Austin, the father of the deceased, it is not necessary to say much. I shall merely ask you to consider the statement, made to you, by the witnesses examined. It is from them only, that I wish you to judge of the serious provocation received.

You have the testimony of Messrs. Babcock, Scott, and Russell, as to expressions used by Mr. Austin, and the manner in which they were delivered. It is by putting yourselves in the situation, in which these witnesses stood, that you must examine the force of Mr. Austin's expressions. Mr. Scott so perfectly understood the meaning of Mr. Austin, that he went to Mr. Selfridge to communicate it; and permit me to say, that, whatever took place at that time, if from the general apprehension of yourselves, you think it was applicable to Mr. Selfridge, you will believe and suppose it to be true, that Mr. Austin meant to charge Mr. Selfridge with being the damned federal lawyer, who had solicited the action; and in a court of law it cannot but be believed to be as high a charge as could be made; it amounted to a criminal offence, for it was that he went about stirring up and soliciting suits. You saw Mr. Scott on the examination stand, and have to decide whether he did, or could believe it was Mr. Selfridge that was meant. The story from Mr. Austin, is, that he had contradicted the report to the very persons to whom he mentioned it. Mr. Scott says that he never did; Mr. Russell, who also heard the imputation, and knew, it appears, how it was intended to be applied, says that Mr. Austin never did contradict that fact. The conduct then, of the Defendant, in demanding a written recantation from Mr. Austin, must appear, I trust, to have been perfectly justifiable, and warranted from the general charge against him. He did not persist in his demand of reparation more pertinaciously, than what, in duty to himself, and family, he was bound to do. He asked only for the means of proving, that Mr. Austin himself had acquitted

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him, from the charge he had made against him, as he found Mr. Austin would not do it himself. This satisfaction was refused. You have it in evidence, that he never received any thing like a satisfaction, which a man of honour, in his profession, or as a man, of any decent standing in society, could be satisfied with. For, there is not the smallest evidence that there was a contradiction of the report, but only an evasion. Mr. Austin did not contradict the charge that he had made; he merely said that he had not used the name of Mr. Selfridge; this, too, was not done by way of disavowal to the man himself to whom he had said it; and was, from the very manner, rather a confirmation than denial. Having thus acknowledged, that he had not used the name of Mr. Selfridge, Mr. Austin satisfies his conscience that he had made every amends. Can any honourable man say that he had, when Mr. Russell and Mr. Scott say that he never had contradicted it to them? When asked, did you contradict it to Mr. Babcock? he, in the first place, says that he heard it from Mr. Babcock, and that this was after the suit was brought. I shall not enlarge on this point; I refer you to the evidence for Mr. Austin's behaviour. His own testimony is against him. Can you, then, have any doubt, that Mr. Selfridge persisted more, than he ought to have done, in requiring Mr. Austin to contradict, in writing what he had circulated; because, said Mr. Selfridge, I find that when you say, you have contradicted the assertion in person, these very people to whom you say you have done it, declare it has not been done. Was it then honourable in Mr Austin, to refuse giving to the Defendant a written acknowledgment, that the report was without foundation? I put it to you, Gentlemen, if you had stated to various persons, from misinformation, that which bore hard on the character of any one, and you were asked to give a note in writing, that you were misinformed, would either of you have refused that small and honest avowal? No; I know you too well to think it; for I know that no honourable man could or would refuse it. For where I have undesignedly done an injury, by spreading a false report of another, would I not fly to retract it, that I might make reparation, as much as I could, and even put it in his power to shew, that he was right and I in an error? Examine whether there was, throughout the whole, a desire in the Defendant for Mr. Austin to do any thing more, than to enable him to have this retraction, that it might be in his power to use it for his own justification. He says, in his conversation with Mr. Welsh, that his only motive in moving in the affair, was to rescue his professional conduct from imputation. That he could not relinquish this pursuit; but before he adopted other measures he would leave Mr. Austin a day or two to reflect. Was this the language of a man who sought revenge? No; it was that of calm and mild expostulation, asking redress for an injury sustained. I shall say no more on this part of the testimony, than to observe, if you give credit to Mr. Austin, you must believe Mr. Welsh tells a falsehood; you

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must believe Eager, Russell, and Scott all tell falsehoods, or are most strangely, not to say grossly mistaken. You cannot, I say, believe the relation of Mr. Austin, unless you believe that all these persons are mistaken.

I now come to the motives and to the conduct of the Defendant, on this unhappy day. If you are of opinion that there was no felonious intent on the part of Mr. Selfridge, at that time, then you cannot find him guilty of manslaughter, because manslaughter must be committed with a felonious intent. If there were no felony in his mind, no crime in his heart, he must be decided by your verdict to be an innocent man.

I wish now to trace the conduct of Mr. Selfridge on that day:— You find there had been a suit prosecuted by him, in which he was, by the desire of Capt. Ingraham, to sue out an execution, and deliver it to him on the Exchange. Capt. Ingraham is positive, that he told the Defendant on Saturday, or Sunday evening, to get the Execution; and that he himself went twice to the Exchange, for the purpose of receiving it from Mr. Selfridge. You have therefore the very reason, why the Defendant went there; when in the common practice of his profession, it would be natural to go on the Exchange, in the general course of business; but here is a particular piece of business, to meet a person by appointment; there can therefore be no doubt, that he went there for that purpose, and for that only.

In the conversation with Mr. Richardson, the Defendant said, he could not confine himself; that his business was of a peculiar nature, and that he must go about it as usual. Perhaps he recollected at the time, that he was to go out on special business, and that was the reason, why he spoke to Mr. Richardson as he did. When this took place with Mr. Richardson, he had no idea of the affray, which afterwards happened. It is hardly possible, if he had entertained the smallest intention of provoking a quarrel, that he should not have mentioned it, in conversation to Mr. Welsh and Mr. Richardson, persons, who were his intimate professional acquaintances. After Mr. Selfridge left his office, you find him walking on the Exchange, in as calm and deliberate a manner, as ever he did, in his life; and if any of you, Gentlemen, have observed Mr. Selfridge walk, you must recollect that he does hold his hands, in walking, exactly as the witnesses have described; for it is the natural position of a man, who would wish to aid the debility of his body; and the manner in which Mr. Selfridge is stated to have walked, gives the exact description of the walk of a weak and feeble man.

From the testimony offered, you will further find, and particularly, by the evidence of Brooks, (for I wish to trace the Defendant down to the Exchange) that he is clear Mr. Selfridge's hands were behind him, and not in his pocket. Mr. Brooks stood at Clark's shop, and observed Mr. Selfridge, from the moment of his entering State-street. He therefore must have seen the position of his arms

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best. Some of the witnesses suppose, that his hands were in his pocket; this was a mistake, that might easily arise from not having a full view of his body. It would be difficult in some kinds of coats, which have the pockets behind, to ascertain whether the hands were actually in them, or not; but Brooks, who saw him pass first in the front, and then in the rear, must be the best qualified to determine, what was the actual situation of the Defendant's hands. *Irwin* tells you, that his hands were behind him; that, in this position, he came down the street, but that, when Austin came out from the side walk, Mr. Selfridge held up his left hand, as if to guard his head, took his right hand from behind him, put it into his pocket, drew out a pistol, extended his arm, and fired.

Take this, with the testimony of French, Bailey, and Shaw, who received from the Defendant the execution he sued out, at the request of Mr. Ingraham, and the current of evidence, from other witnesses; for on these facts it is, that you have to determine, and if you must judge from the weight of evidence, and decide according to the number of witnesses, you can have no doubt that the Defendant, instead of going to meet an affray, was going down to the Exchange on special business, with his hands behind him, and walking very deliberately, when he was assaulted by young Austin. Further, to prove, that he could not have gone to seek this insult, you will please to recollect that he went with his face looking towards the Branch Bank, and not towards the place, where the deceased was. When in this situation, judge you whether a man with, as you are told, the sun in his eyes, and his hat flapped or slouched over them; could have seen Mr. Austin, who stood with his back against Mr. Townsend's shop. It is manifest that Mr. Selfridge could not, from the course he was taking, have looked that way, and it is in evidence that he did not bear towards Mr. Townsend's shop, till obliged, from the violence of young Austin's attack, to turn to defend himself. Some say that he stepped back, others, that he turned round to do this.

It would seem, that, when the Defendant had got a little to the southward of the middle of the street, the unfortunate young man rushed out and made an attack upon him. Let us, for the purpose of ascertaining this, now compare the testimony. Lewis Glover states to you, that he went into State-street that day, for the express purpose of seeing what would take place, supposing there would be an affray between Mr. Selfridge and some other person, in consequence of the publication in the Gazette. He says he took a station, where he had a full view of the Defendant, as he came down the street; that he walked very deliberately with his hands behind him; that Austin went from the pavement with a quick pace, directly against Selfridge, with his can uplifted, and gave the Defendant one violent blow, and as he was giving the second, Selfridge fired. If you believe this, there was, before the discharge of the pistol, as violent a blow given, as could be struck by an athletic young man, di-

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rectly on the defendant's head. This witness's credit stands totally unimpeached, even if alone; but is it not corroborated? Mr. Edwards also was in expectation of some affray, and stopped before Mr. Townsend's shop. He saw Mr. Selfridge walking in a direction that would have brought him on the brick pavement near the Branch Bank, when a person brushed by him, and got near the middle of the street, with a stick in his hand; he adds, that it was uplifted, but whether in the attitude of giving or receiving a blow, he could not say; but that the cane descended, and the pistol was fired at the same instant. You have it, however, in evidence, that just before, something caught the eye of Mr. Edwards, and he turned his head to Mr. French. Does not this interval afford time for the first blow deposed to by Glover? Were there no other testimony, but that delivered by these two witnesses, would not this of Edwards be the strongest corroboration of that of Glover? Would you not, on giving a due credit to both, say that his evidence is confirmed by the statement of Edwards? Consider the situation of the parties; Selfridge coming down the street, pursuing a course that would have taken him to the left of Austin, towards the Branch Bank—as soon as Austin perceived him, he changed his stick from the left to the right hand, and brushed by every one with a quick pace. Consider the distance between him and Selfridge, the few paces that intervened; that Mr. Austin was running on the Defendant, as you have been told, as if he was going to attack a wild beast; that he sprung from the pavement and rushed on him, when it was not possible for Mr. Selfridge, whose hat was over his eyes, and when his hands were behind him, to guard himself before a blow could have been given. The circumstances of the case render the testimony of Glover so confirmed, as not to leave you a possibility of doubting it, and unless what is testified be contradicted, you cannot reject it; but if it be of such a nature, that it can be reconciled with, and is supported by circumstances and other evidence, you cannot but believe it. See how this is established more and more by every comparison. Wiggin says that he was in State-street also, for the purpose of seeing any thing that might take place; that he was conversing about young Austin and Selfridge; that he saw Mr. Austin with a stick in his hand, and Selfridge coming down the street, that he looked round for Austin, after having seen Mr. Selfridge, and while his eye was thus momentarily directed, he heard a blow. Can you account for this, and the other blow which followed, unless there was one given before the pistol was fired? Mr. Wiggin could not have been deceived, when all his attention was awake, for the purpose of observation; and he saw, when the pistol was fired, the hand descending again. There is a corroboration as strong as possible of this fact, that a blow was given before the discharge of the pistol, from the testimony of Bailey and French. They tell you the assault was as violent as possible, and that they could not tell which was

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first, the blow or the firing of the pistol. Now, if their eyes were turned aside, but for an instant, there can be no doubt but that this evidence is true, and that they did not see the whole of the transaction.

From some of the testimony, it appears, that in wounds of this kind, the strength is very great, and the muscular action quicker and more sudden. Do not these circumstaces go to corroborate the statement of Mr. Glover, and to account for the instantaneous act of the blow, and discharge of the pistol?

It is but fair to draw this conclusion, that, when witnesses testify positively to a fact, which other persons might not have seen, but which is neither contradicted by, nor contradicts the testimony given by others, to believe that what was seen, by some of the witnesses might have escaped the observation of the others. Because, if you do this, you give credit to each party, without supposing either to have sworn falsely.

I now come to the testimony of Mr. Fales. I mean not by any means to discredit him. I believe him to be an honourable young man; nor has any thing that has taken place, caused me to doubt it. I however do believe, that when a transaction is recent and fresh, the impressions are stronger than at a future day. I need not contend for a proposition like this. There is no reason to suppose that he could *then* tell what was untrue. He relates that there was some conversation between young Austin and himself about the cane, from which you will draw your own conclusions. It appears, however, that he had some apprehensions about his friend's having this cane, for he asked young Austin to give it him, and he states, that, when at Townsend's shop, the deceased brushed by him, and went towards Mr. Selfridge. He further tells you, and he tells you very candidly, that he cannot tell which was first, the blow, or the firing of the pistol.

When you see the sensibility of this young gentleman, who could not but be agitated on the occasion, when he was deceived and deluded by his friend, who had told him he was not on this errand, could he be unrufled, calm, and unagitate? Surely not, for even at our time of life, when the nerves are hardened, when we are not so liable to be agitated as a young man, like Mr. Fales, should we see a person spring forward to do that which we should so earnestly wish he was not going to do, would we not feel agitated and alarmed?

Had he any motive on earth not to declare the actual fact? Had he any occasion to prevaricate? None. Would you, Gentlemen of the Jury, or would you not believe what he said at that time? Can you think he did not then feel every disposition to speak, in favour of his friend, who lay bleeding and dead on the spot he had left? He must have had every feeling alive to the memory of his friend, and would have been happy to raise it, in the estimation of those he addressed. It is but natural that he should. But it is not in nature that he should wish to say any thing against him. How then can you

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account for the anſwer? It was the undiſguiſed voice of truth, at a moment, when ſhe could be the leaſt concealed, in anſwer to a diſtinct and poſitive queſtion. It is on *that* anſwer that I would rely, and it is on that, that you will, I truſt, alſo rely.

Look to the further declarations of Mr. Fales, on this unhappy occaſion. In the courſe of the evening, when Mr. Benjamin Auſtin muſt have felt all that reſentment, which a parent may be ſuppoſed to feel, againſt the man, who had taken the life of his ſon; when he could not wiſh to hear his child deemed the aggreſſor; when Mr. Fales could not have wiſhed to plant a dagger in a father's boſom; when he muſt have gone to the houſe of Mr. Auſtin with far different intentions; when he went to adminiſter balm and conſolation to an aged and afflicted parent; when it might, without impeaching the character of Mr. Fales, be well ſuppoſed, he wiſhed to hide the truth, but truth muſt be told. What was it that he then anſwered to a father's queſtion? "Your ſon ſtruck a blow firſt; a violent blow, before the piſtol was fired." Had Mr. Fales the leaſt motive to repreſent his friend's conduct as influenced by the ſpirit of a bravado, or to give that colour to the tranſaction? Mr. Nichols went and made a memorandum of the words. You have this fact fully in evidence. There was, then, every motive, but that of truth, to tell a different ſtory. From the repreſentations made, by the friend of the deceaſed at the very hour of his death; from his anſwer to an inquiring and afflicted parent, you have the teſtimony of Glover moſt fully and completely corroborated. There muſt neceſſarily have been one violent blow firſt, and on the ſecond blow deſcending, the piſtol was fired. Thus then ſtands the evidence of this important fact; you have to it, the poſitive teſtimony of Glover, corroborated by that of Edwards, and of Wiggin, by a circumſtance as ſtrong, as if he had ſeen the blow, for he heard it. You have it corroborated, not only by the firſt declarations of Mr. Fales, but from probability ariſing, from the manner, in which he delivered his teſtimony, when on the ſtand.

This then was the ſituation of the Defendant, he was going down State ſtreet, not only on his juſt and ordinary buſineſs, but on a ſpecial engagement, to meet a client there, for a particular purpoſe. True, he had notice that ſome perſon was to be hired to deſtroy or attack him. It may have been ſaid that he could have gone to a magiſtrate, and obtained the protection of the laws of his country and have taken ſecurity, for keeping the peace. I agree that this would have been a fair anſwer to the queſtion of, what could he do? If Mr. Cabot had ſaid, young Auſtin is to attack you; ſpeaking as I do in a Court of Juſtice, it was, under ſuch a circumſtance, his duty to have done ſo. But it was not ſo ſaid to him, it was merely mentioned to him, that ſome perſon was to be hired or employed to deſtroy or beat him. He had it not, then, in his power, to avail himſelf of the protection of the law, by taking ſecurity; for he did not

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know by whom he was to be aſſailed. It became then, as the laws of his country could not afford him protection, a duty in him to protect his own life by all the means in his power. The particular purpoſe for which he had the piſtol in his pocket I know not. What it was is not fully in evidence. But the plain fact, is this, that the Defendant, with a piſtol in his pocket, was going down to the Exchange on buſineſs, and was met by a man coming upon him like a perſon attacking a wild beaſt; a blow was ſtruck on his head which would have fractured his ſkull, had it not been for the hat which he had on. What did nature, what did law and reaſon prompt to do on ſuch an occaſion? Was it not to make uſe of every means in his power to defend himſelf? Let me here aſk what were theſe means? You have heard accounts of his debilitated ſtate, his total want of muſcular ſtrength. He could not have defended himſelf by his hands; he could not have got out of the way; for he was unable to fly. You have it in evidence, that Auſtin was on the run; he could not then have even turned round without receiving two or three blows, perhaps fatal ones. What then could he do? that only which he could do in defence of his life. The only remaining thing he had to do, was what he was compelled to do. He took his piſtol from his pocket, and, after having received one blow, killed, as he was receiving another from the aſſailant, who would have killed him. This is the defence we make to the charge againſt Mr. Selfridge. This we contend to be the legal and proper one, of juſtifiable homicide to preſerve his own life. If this be unwarrantable, our defence is gone. But if nature, if reaſon, if inſtinct impel every created being, when attacked to make uſe of all the means in his power to defend his life and perſon, you cannot adjudge this to have been unlawful in the Defendant, without reducing every one, that is aſſailed by a ruffian, to this dreadful alternative, of periſhing by the hand of violence, or by the verdict of a Jury. After this was done, Mr. Selfridge defended himſelf by holding up his hands. Some ſay he ſtruck; I muſt ſay, that from the teſtimony, it appears to me he did not. But allowing that he did, it was natural that he ſhould do ſo. He threw his piſtol it is true; but whether at the deceaſed or not, does not appear. The perſon ſays it was thrown at his head, and Howe tells us it rolled towards Mr. Ruſſell's printing office.

The conflict over, no violence was ſeen on the part of Mr. Selfridge. Nothing barbarous, nothing even like anger or rage. He went forward as if exhauſted, and leaned againſt Mr. Townſend's ſhop. Some cried out, who is the raſcal that has killed him? I, ſaid the Defendant, am the man. I mean not to go away. I know what I have done, and am ready to anſwer for it to the laws of my country.

Mr. Melville came up to him, and ſaid, you ought not to go away. I do not intend to, was ſtill the anſwer.

When other perſons, ſeeing a crowd aſſembled, and violence talked of, adviſed him to retire. He went off, ſending for the officers of

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Juſtice, that he might be ready to anſwer to the laws of his country, if he had offended againſt them. He deſired Mr. Bourne to let Bell be informed where he was to be found. This was the conduct not of guilt, but of conſcious innocence. It is attempted to be done away by ſaying, that he was to have dined with Mr. Bell; but could any man, eſpecially a lawyer, after an act of this ſort, have imagined that he might take his dinner, without interruption, in a public houſe?—There can be no doubt therefore, that he told where he was to be found by the ſheriff of the county. True, he went away, but not to fly. It was in that awful moment, as in this, that he appealed from the paſſions of the people to their judgment, from their imagination to their reaſon, from their feelings, to their ſenſe of juſtice, from their violence, to his country. You, Gentlemen of the Jury, are that country.

It is not poſſible to conceive any motive to do this act, but what aroſe from neceſſity, impoſed at the very inſtant. It is hardly in evidence, that Mr. Selfridge knew this unfortunate young man.

If there had been any feelings of revenge to gratify, would he have gone on the Exchange to indulge them? No, he would have ſought ſome other opportunity. And what was his behaviour there? He was tranquil and calm.—Look at his after conduct. It was not the reſult of hardneſs of heart, but of that conſcious innocence which protects the man unpolluted with ſin, when every friend flies from him; which in the hour of terror and diſmay, whiſpers comfort and conſolation to his ſoul: for the heart which knows no crime, can be tormented with no remorſe.

This, Gentlemen, is, I believe, the whole of our ſtory. I am not permitted, by the rules of the Court, to go into argument on the facts. I have barely ſtated the law; not what are my notions of it, but from the books. I took eſpecial care not to ſtate the caſe before the witneſſes were examined. For it was not my wiſh either to exaggerate or diminiſh. I meant to place it on the ground of the evidence itſelf, and to leave, without any appeal to the paſſions, your minds open to receive the fair impreſſions from the teſtimony I have attempted to recapitulate. Having ſaid nothing but what they teſtified, I have done all the duty which in this ſtate of the caſe, I am at liberty to perform. I therefore leave the Defendant with you, barely ſtating my own conviction, as a lawyer, a chriſtian, and a man, that he has committed no offence, either againſt the law of ſociety, of religion, or of nature. That he has not, againſt the law of ſociety, I bottom myſelf on the authorities which have been read. That he has not againſt the laws of religion, I infer from the duty which every created being owes to Him, who in his beneficence, brought us into exiſtence, to defend life, by all the means in his power. Not againſt the law of nature, for whatever theoriſts, or ſpeculative men may ſay to the contrary, yet, when the alternative ariſes, whether a man muſt fall, or whether it muſt be he who aſſaults him; whether

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he muſt ſacrifice all his duties to God, to religion, and to ſociety, or put to death the man by whom he is aſſailed, nature would aſſert her prerogative, the aggreſſor muſt die, and the innocent man remain alive.

Stephen Skelton (called by the counſel for the Government) ſworn.

Att. Gen. Did you ſee the Defendant on the fourth of Auguſt?

Witneſs. Very ſhortly after the death, I ſaw him, he was ſtanding near the poſt office. A gentleman that was by him ſaid to him, "you are agitated." He replied that he was not, he had done as he meant to do, or what he meant to do, or no more than he meant to do; I cannot ſay poſitively which of theſe expreſſions he uſed.

Richard Edwards called, in behalf of the Defendant.

Gore. Was you by when Mr. Selfridge went from State Street?

Witneſs. I was; had been obſerving him, to ſee if he was going away, and which way he ſhould go. I heard him ſay that he was the man; that he did not intend to go away. When Major Melville came up and told him he hoped he would not think of going away, he ſaid he was not going off. Afterwards Mr. Ritchie preſſed him, and took him away with him. I heard no ſuch obſervation as Mr. Skelton has teſtified to.

William Ritchie, called by Mr. Gore.

Gore. Pleaſe to relate particularly the circumſtances that occurred after the death.

Witneſs. I heard nothing of the ſpeech which Mr. Skelton has teſtified to. When I adviſed him to go with me, he would not. I had hold of his arm, and was preſſing him to go, when Major Melvill ſpoke to him; he broke from me and refuſed to go. He ſaid he was not ſo much agitated as I was: he knew very well what he had done. He afterwards went with me to my houſe, and when he heard of the death (I had no belief that Auſtin was dead, before I went home) he expreſſed great regret, and ſaid, if he ſhould be permitted to attend the funeral, he believed he ſhould be as ſincere a mourner as any one in the proceſſion, except the parents themſelves.

Att. Gen. As the authorities read from Grotius and Hale are explained by former and ſubſequent paſſages, I will beg leave to read them now, that the oppoſite ſide may have an opportunity of commenting on them. The firſt is

Hale's Hiſt. P. C. 451. "Malice in fact is a deliberate intention of doing ſome corporal harm to the perſon of another."

"Malice in law, or preſumed malice, is of ſeveral kinds, viz. 1. In reſpect of the manner of the homicide. 2. In reſpect of the perſon killed, viz. a miniſter of juſtice in execution of his office. 3. In reſpect of the perſon killing."

"Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized."

"The evidences of ſuch a malice muſt ariſe from external circumſtances diſcovering that inward intention, as lying in wait, menacings antecedent, formed

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grudges, deliberate compaſſings, and the like, which are various according to variety of circumſtances."

Ibid 452. "A. challenges C. to meet in the field to fight, C. declines it as much as he can, but is threatened by A. to be poſted for a coward, &c. if he meet not, and thereupon A. and B. his ſecond, and C. and D, his ſecond, meet and fight, and C. kills A. this is murder in C. and D. his ſecond, and ſo ruled in *Taverner's* caſe, though C. unwillingly accepted the challenge."

"If A. challenge B. to fight, B. declines the challenge, but lets A. know, that he will not be beaten, but will defend himſelf! if B. going about his occaſions wears his ſword, is aſſaulted by A. and killed, this is murder in A.; but if B. had killed A. upon that aſſault, it had been *ſe defendendo*, if he could not otherwiſe eſcape, or bare homicide, if he could eſcape, and did not."

"But if B. had only made this as a diſguiſe to ſecure himſelf from the danger of the law, and purpoſely went to the place, where probably he might meet A. and there they fight, and he kills A. then it had been murder in B.; but herein circumſtances of the fact muſt guide the jury."

"If A. and B. fall ſuddenly out, and they preſently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and A. kills B. this is not murder but homicide, and it is but a continuance of the ſudden falling out, and the blood was never cooled; but if there were deliberation, as that they meet the next day, nay, though it were the ſame day, if there were ſuch a competent diſtance of time, that in common preſumption they had time of deliberation, then it is murder."

"A boy came into *Oſterley* park to ſteal wood, and ſeeing the woodward, climbs up a tree to hide himſelf, the woodward bids him come down, he comes down, and the woodward ſtruck him twice, and then bound him to his horſe tail, and dragged him till his ſhoulder was broke, whereof he died; it was ruled murder, becauſe 1. The correction was exceſſive, and 2. It was an act of deliberate cruelty."

"If the maſter deſigneth moderate correction to his ſervant, and accordingly uſeth it, and the ſervant by ſome misfortune dieth thereof, this is not murder, but *per infortunium*. Becauſe the law alloweth him to uſe moderate correction, and therefore the deliberate purpoſe thereof is not *ex malitiâ præcogitata*."

"But if the maſter deſigneth an immoderate or unreaſonable correction, either in reſpect of the meaſure, or manner, inſtrument thereof, and the ſervant die thereof, I ſee not how this can be excuſed from murder, if done with deliberation and deſign, nor from manſlaughter, if done haſtily, paſſionately, and without deliberation; and herein conſideration muſt be had of the manner of the provocation, the danger of the inſtrument, which the maſter uſeth, and the age or condition of the ſervant that is ſtricken, and the like of a ſchoolmaſter towards his ſcholar."

4. Black. Com. 194. "We are next to conſider the crime of deliberate and wilful murder; a crime at which nature ſtarts, and which is I believe puniſhed almoſt univerſally throughout the world with death. The words of the Moſaical law (over and above the general precept to Noah, "that whoſo ſheddeth man's blood, by man ſhall his blood be ſhed") are very emphatical in prohibiting the pardon of murderers. "Moreover ye ſhall take no ſatisfaction for the life of a murderer, who is guilty of death, but he ſhall ſurely be put to death; for the land cannot be cleanſed of the blood that is ſhed therein, but by the blood of him that ſhed it."

Ibid. 195. Murder is therefore now thus defined, or rather deſcribed by Sir Edward Coke; "when a perſon of ſound memory and diſcretion, unlawfully killeth any reaſonable creature in being and under the king's peace, with malice aforethought, either expreſs or implied."

Ibid. 196. "Next it happens when a perſon of ſuch ſound diſcretion *unlawfully killeth*. The unlawfulneſs ariſeth from the killing without warrant or excuſe."

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Ibid. 200. "Alſo in many caſes where no malice is expreſſed, the law will imply it: as, where a man wilfully poiſons another, in ſuch a deliberate act the law preſumes malice, though no particular enmity can be proved. And if a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight or no apparent cauſe. No affront, by words or geſtures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder. In like manner if one kills an officer of juſtice, either civil or criminal, in the execution of his duty, or any of his aſſiſtants endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray, or apprehend a felon, knowing his authority or the intention with which he interpoſes, the law will imply malice, and the killer ſhall be guilty of murder. And if one intends to do another felony, and undeſignedly kills a man, this is alſo murder. Thus if one ſhoots at A, and miſſes him, but kills B, this is murder; becauſe of the previous felonious intent, which the law transfers from one to the other. The ſame is the caſe where one lays poiſon for A; and B, againſt whom the priſoner had no malicious intent, takes it, and it kills him; this is likewiſe murder. So alſo, if one gives a woman with child a medicine to procure abortion, and it operates ſo violently as to kill the woman, this is murder in the perſon who gave it. It were endleſs to go through all the caſes of homicide, which have been adjudged either expreſsly, or impliedly, malicious: theſe therefore may ſuffice as a ſpecimen; and we may take it for a general rule that all homicide is malicious, and of courſe amounts to murder, unleſs where juſtified by the command or permiſſion of the law; excuſed on the account of accident or ſelf preſervation; or alleviated into manſlaughter, by being either the involuntary conſequence of ſome act, not ſtrictly lawful, or (if voluntary) occaſioned by ſome ſudden and ſufficiently violent provocation. And all theſe circumſtances of juſtification, excuſe, or alleviation, it is incumbent upon the priſoner to make out, to the ſatisfaction of the court and jury."

The Attorney General then read an extract from Judge Trowbridge's charge at the trial of the ſoldiers in 1770.

"Homicide is of three kinds; juſtifiable, excuſable, and felonious: the firſt has no ſhare of guilt at all; the ſecond very little; but the third is the higheſt crime againſt the law of nature. There are alſo degrees of guilt in felonious homicide, which divide the offence into manſlaughter and murder. I ſhall give ſome inſtances under each head, proper to be conſidered in this caſe, and known at this day. And firſt of juſtifiable homicide: killing him who attempts to rob or murder me, to break open my dwelling houſe in the night, or to burn it, or by force to commit any other felony on me, my wife, child, ſervant, friend, or even a ſtranger, if it cannot otherwiſe be prevented, is juſtifiable. So in caſe of a ſudden affray, if a private perſon interpoſing to part the combatants, and giving notice of his friendly deſign, is aſſaulted by them, or either of them, and in the ſtruggle happens to kill, he may juſtify it, becauſe it is the duty of every man to interpoſe in ſuch caſes to preſerve the public peace."

"Homicide excuſable in ſelf defence, is where one engaged in a ſudden affray quits the combat before a mortal wound is given, retreats as far as he ſafely can, and then urged by mere neceſſity, kills his adverſary in the defence of his own life. This differs from juſtifiable ſelf defence, becauſe he was to blame for engaging in the affray, and therefore muſt retreat as far as he can ſafely; whereas in the other caſe aforementioned, neither the peace officers, nor his aſſiſtants, nor the private perſon, is obliged to retreat, but may ſtand and repel force by force.

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"Manſlaughter is the unlawful killing another without malice expreſs or implied: as voluntarily upon a ſudden heat, or involuntarily in doing an unlawful act. Manſlaughter on a ſudden provocation, differs from excuſable homicide in ſelf defence, in this; that in one caſe there is an apparent neceſſity for ſelf preſervation to kill the aggreſſor, in the other there is no neceſſity at all, it being a ſudden act of revenge."

Sol. Gen. To rightly underſtand the paſſages from Grotius, read by Mr. Gore, in his opening, it will be neceſſary to refer to other parts of the ſame author. I therefore ſhall read from

Book II. ch. 1. § 3. "We have before obſerved, that if a man is aſſaulted in ſuch a manner, that his life ſhall appear in inevitable danger, he may not only make war upon, but very juſtly deſtroy the aggreſſor; and from this inſtance, which every one muſt allow us, it appears that ſuch a private war may be juſt and lawful; for it is to be obſerved, that this right or property of ſelf defence is what nature has implanted in every creature, without any regard to the intention of the aggreſſors; for if the perſon be no ways to blame, as for inſtance, a ſoldier upon duty; or a man that ſhould miſtake me for another, or one diſtracted, or a perſon in a dream, (which may poſſibly happen.) I do not therefore loſe that right that I have of ſelf defence; for it is ſufficient that I am not obliged to ſuffer the wrong that he intends me, no more than if it was a man's beaſt that came to ſet upon me."

"It is a matter of diſpute, whether we may kill or trample on innocent perſons, who ſhall hinder that defence, or eſcape, that is abſolutely neceſſary for the preſervation of our lives. There are ſome even among divines who think it lawful. And certainly, if we have regard to nature only, the reſpect that we owe to ſociety in general, is of leſs moment than the preſervation of ourſelves; but the law of charity, eſpecially the evangelical, which has put our neighbour upon a level with ourſelves, does plainly not permit it."

"It was well obſerved of Aquinas, if apprehended rightly, that in our own defence we do not purpoſely kill another; not but that it may be ſometimes lawful, if all other means prove ineffectual, to do that purpoſely by which the aggreſſor may die; not that this death was ſo much our choice, or primary deſign, (as in capital puniſhments,) but the only means we had then left to preſerve ourſelves; nay, and even then, one would wiſh, if poſſible, rather to fright or diſable him, than to be obliged, even by mere neceſſity, to kill him."

Ibid. p. 9. "If then I am not threatened with any preſent danger, if I only diſcover that ſomebody has laid a plot and ambuſcade againſt me, that he deſigns to poiſon me, or by ſuborning witneſſes to procure an unjuſt ſentence againſt me, why, in this caſe, I muſt not kill him; if either ſuch a danger can be poſſibly avoided any other way, or at leaſt, that it does not then ſufficiently appear that it may not be avoided. For time gives us frequent opportunities of remedy, and there may many things happen, as the proverb has it, betwixt the cup and the lip. Though there are both divines and lawyers, who are a little too indulgent in thisaffair: however, the other opinion, which is certainly the ſafer and better, is not altogether deſtitute of authority."

"But what ſhall we then ſay of the danger of loſing a limb, or a member? when a member, eſpecially if one of the principal, is of the higheſt conſequence, and even equal to life itſelf; and it is beſides doubtful whether we can ſurvive the loſs; it is certain, if there be no poſſibility of avoiding the misfortune, the criminal perſon may be lawfully and inſtantly killed."

Ibid. p. 14. "There are ſome of opinion, that if a man is in danger of receiving a box on the ear, or any injury of the like nature, he has a right of revenging ſo ſmall a crime, even by the death of him that attempts it. If regard be here only had to expletive juſtice, I do not deny it; for although there be no manner of proportion betwixt death, and ſo ſlight an injury; yet whoever ſhall attempt

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to wrong me, gives me from that time a right, that is, a certain moral power against him for ever; upon a ſuppoſition, that I am not otherwiſe capable of diverting ſuch an injury from my own perſon. Neither does human affection itſelf ſeem to limit us here to any thing that may be in favour of the aggreſſor; but the goſpel does expreſsly forbid this, for Chriſt commanded his apoſtles rather to receive a ſecond blow, than to hurt their adverſary. How much more then does he forbid the killing of a man for ſo trivial an offence?"

Ibid, p. 15. "It is therefore very ſurpriſing, that when God has ſo manifeſtly declared his will in the goſpel, we ſhould find divines, nay chriſtian divines, who maintain, that it is not only lawful to kill a man, in order to avoid ſo trivial an injury; but to purſue him, in caſe he ſhould endeavour to eſcape, to recover their honour, as they call it; which to me ſeems as well contrary to reaſon, as to piety. For honour being the opinion of ſome excellency or merit, he that can put up ſuch an affront, expreſſes a particular excellency of temper; and therefore rather adds to his honour, than detracts from it. Neither is it at all material, if ſome men of corrupt judgment ſhall revile this virtue with an opprobrious name, their opinions being of no moment, either to alter the thing itſelf, or the reputation it carries among men of ſenſe."

Job Baſs (called by the Government's counſel)—ſworn.

Att. Gen. Did you ſee this affair?

Witneſs. Yes, I firſt ſaw Mr. Selfridge ſtanding at his office door; ſaw him walk down to the corner of the old State Houſe; when paſt the corner, he put his hands behind him, and walked ſlowly towards Congreſs Street. I ſaw Mr. Auſtin ſtanding near Mr. Townſend's ſhop, and when he ſtepped out towards Mr. Selfridge, he raiſed his right arm. Mr. Selfridge's arm was removed from behind him, and raiſed to a horizontal poſition. The piſtol went off immediately, and then Mr. Auſtin ſtruck him violently acroſs the forehead.

Dexter. May it please your honor, and you gentlemen of the jury—It is my duty to submit to your conſideration ſome obſervations in the cloſe of the defence of this important and intereſting cauſe. In doing it, though I feel perfectly ſatisfied that you are men of pure minds, yet I reflect with anxiety, that no exertion or zeal on the part of the defendant's counſel can poſſibly inſure juſtice, unleſs you likewiſe perform your duty. Do not ſuppoſe that I mean to ſuggeſt the leaſt ſuſpicion with reſpect to your principles or motives. I know you to have been ſelected in a manner moſt likely to obtain impartial juſtice; and doubtleſs you have honeſtly reſolved, and endeavoured to lay aſide all opinions which you may have entertained previous to this trial. But the difficulty of doing this, is perhaps not fully eſtimated; a man deceives himſelf, oftener than he miſleads others; and he does injuſtice from his errors, when his principles are all on the ſide of rectitude. To exhort him to overcome his prejudices, is like telling a blind man to ſee. He may be diſpoſed to overcome them, and yet be unable becauſe they are unkown to himſelf. When prejudice is once known, it is no longer prejudice, it becomes corruption; but ſo long as it is not known, the poſſeſſor cheriſhes

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it without guilt; he feels indignation for vice, and pays homage to virtue; and yet does injustice. It is the apprehension that you may thus mistake—that you may call your prejudices, principles, and believe them such, and that their effects may appear to you the fruits of virtue; which leads us so anxiously to repeat the request, that you would examine your hearts, and ascertain that you do not come here with partial minds. In ordinary cases there is no reason for this precaution. Jurors are so appointed by the institutions of our country, as to place them out of the reach of improper influence on common occasions; at least as much so as frail humanity will permit.

But when a cause has been a long time the subject of party discussion—when every man among us belongs to one party or the other, or at least is so considered—when the democratic presses, throughout the country, have teemed with publications, fraught with appeals to the passions, and bitter invective against the defendant;—when on one side every thing has been done, that party rage could do, to prejudice this cause; and on the other, little has been said in vindication of the supposed offender; though on one occasion I admit that too much has been said; when silence has been opposed to clamour and patient waiting for a trial to systematic labour to prevent justice;—when the friends of the accused, restrained by respect for the laws, have kept silence, because it was the exclusive right of a Court of Justice to speak,—when no voice has been heard from the walls of the defendant's prison, but a request that he may not be condemned without a trial; the necessary consequence must be, that opinion will progress one way,—that the stream of incessant exertion will wear a channel in the public mind; and the current may be strong enough to carry away those who may be jurors, though they know not how, or when, they received the impulse that hurries them forward.

I am fortunate enough not to know, with respect to most of you, to what political party you belong. Are you republican federalists? I ask you to forget it; leave all your political opinions behind you; for it would be more mischievous, that you should acquit the defendant from the influence of these, than that an innocent man, by mistake, should be convicted. In the latter case, his would be the misfortune, and to him would it be confined; but in the other, you violate a principle, and the consequence may be ruin. Consider what would be the effect of an impression on the public mind, that in consequence of party opinion and feelings, the defendant was acquitted. Would there still be resource to the laws, and to the justice of the country? Would the passions of the citizen, in a moment of frenzy, be calmed by looking forward to the decision of courts of law for justice?

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Rather every individual would become the avenger of imaginary transgression—Violence would be repaid with violence; havoc would produce havoc; and instead of a peaceable recurrence to the tribunals of justice, the spectre of civil discord would be seen stalking through our streets, scattering desolation, misery, and crimes.

Such may be the consequences of indulging political prejudice on this day; and if so, you are amenable to your country and your God. This I say to you who are federalists; and have I not as much right to speak thus to those who are democratic republicans? That liberty which you cherish with so much ardor, depends on your preserving yourselves impartial in a court of justice. It is proved by the history of man, at least of civil society, that the moment the judicial power becomes corrupt, liberty expires. What is liberty but the enjoyment of your rights, free from outrage or danger? And what security have you for these, but an impartial administration of justice? Life, liberty, reputation, property, and domestic happiness, are all under its peculiar protection. It is the judicial power, uncorrupted, that brings to the dwelling of every citizen, all the blessings of civil society, and makes it dear to man. Little has the private citizen to do with the other branches of government. What to him are the great and splendid events that aggrandize a few eminent men and make a figure in history? His domestic happiness is not less real because it will not be recorded for posterity: but this happiness is his no longer than courts of justice protect it. It is true, injuries cannot always be prevented; but while the fountains of justice are pure, the sufferer is sure of a recompence.

Contemplate the intermediate horrors and final despotism, that must result from mutual deeds of vengeance, when there is no longer an impartial judiciary, to which contending parties may appeal, with full confidence that principles will be respected. Fearful must be the interval of anarchy; fierce the alternate pangs of rage and terror; till one party shall destroy the other, and a gloomy despotism terminate the struggles of conflicting factions. Again, I beseech you to abjure your prejudices. In the language once addressed from Heaven to the Hebrew prophet, "Put off your shoes, for the ground on which you stand is holy." You are the professed friends, the devoted worshippers of civil liberty; will you violate her sanctuary? Will you profane her temple of justice? Will you commit sacrilege while you kneel at her altar?

I will now proceed to state the nature of the charge on which you are to decide, and of the defence which we oppose to it; then examine the evidence, to ascertain the facts, and then inquire what is the law applicable to those facts.

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The charge is for manslaughter; but it has been stated in the opening, that it may be necessary to know something of each species of homicide, in order to obtain a correct idea of that which you are now to consider.

Homicide, as a general term, includes, in law, every mode of killing a human being. The highest and most atrocious is murder; the discriminating feature of which is previous malice.—With that the defendant is not charged: the Grand Jury did not think that by the evidence submitted to them, they were authorized to accuse him of that enormous crime. They have therefore charged him with manslaughter only.

The very definition of this crime, excludes previous malice; therefore it is settled, that there cannot, with respect to this offence, be an accessary before the fact; because the intention of committing it is first conceived at the moment of the offence, and executed in the heat of a sudden passion, or it happens without any such intent, in doing some unlawful act. It will not be contended that the defendant is guilty of either of these descriptions of manslaughter. Neither party suggests that the defendant was under any peculiar impulse of passion at the moment, and had not time to reflect; on the contrary, he is said to have been too cool and deliberate. The case in which it is important to inquire, whether the act was done in the heat of blood, is where the indictment is for murder, and the intent of the defence is to reduce the crime from murder to manslaughter; but Selfridge is not charged with murder. There is nothing in the evidence that has the least tendency to prove an accidental killing, while doing some unlawful act. It is difficult to say, from this view of manslaughter, when compared with the evidence, on what legal ground the defendant can be convicted; unless it be, that he is to be considered as proved guilty of a crime which might have been charged as murder, and by law, if he now stood before you under an indictment for murder, you might find him guilty of manslaughter, and therefore you may now convict him.

This does not appear to be true; for the evidence would not apply to reduce the offence from murder to manslaughter, on either of the aforementioned grounds. Perhaps it may be said that every greater includes the less, and therefore, manslaughter is included in murder; and that it is on this principle that a conviction for manslaughter may take place on an indictment for murder. I will not detain you to examine this, for it is not doing justice to the defendant to admit, for a moment, even for the sake of argument, that the evidence proves murder. Our time will be more usefully employed in considering the principles of the defence. Let it be admitted then, as stated by the counsel for government, that, the killing being proved, it is incumbent

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on the defendant to discharge himself from guilt. Our defence is simply this, that the killing was necessary in self defence; or, in other words, that the defendant was in such imminent danger of being killed, or suffering other enormous bodily harm, that he had no reasonable prospect of escaping, but by killing the assailant.

This is the principle of the defence stripped of all technical language. It is not important to state the difference between justifiable and excusable homicide, or to show to which the evidence will apply; because, by our law, either being proved, the defendant is entitled to a general acquittal.

Let us now recur to the evidence and see whether this defence be not clearly established.

[*Mr. Dexter then went into a minute examination of the whole evidence, which is here omitted, because it was necessarily very long and the evidence itself is all before the public. In the course of it he laboured to prove, that Mr. Selfridge went on the exchange about his lawful business, and without any design of engaging in an affray; that he was in the practice of carrying pistols, and that it was uncertain whether he took the weapon in his pocket in consequence of expecting an attack; that if he did, he had a right so to do, provided he made no unlawful use of it; that the attack was so violent and with so dangerous a weapon, that he was in imminent danger; that it was so sudden, and himself so feeble, that retreat would have been attended with extreme hazard; that the pistol was not discharged until it was certain that none would interfere for his relief, and that blows, which perhaps might kill him, and probably would fracture his skull, were inevitable in any other way, and that the previous quarrel with the father of the deceased, if it could be considered as affecting the cause, arose from the misbehaviour of old Mr. Austin, and that the defendant had been greatly injured in that affair.*]

Mr. Dexter then proceeded as follows.—

It cannot be necessary, gentlemen, for the defendant to satisfy you beyond doubt, that he received a blow before the discharge of the pistol. There is positive evidence from one witness, that the fact was so, and other witnesses say much that renders it probable. But if the defendant waited until the cane was descending, or even uplifted within reach of him, reason and common sense say, it is the same thing; no man is bound to wait until he is killed, and being knocked down, would disable him for defence. The killing can be justified only on the ground that it was necessary to prevent an injury that was feared; not that it was to punish for one that was past. This would be revenge, and not self defence.

The same law authorities, which tell you, that a man must retreat as far as he can, say also, that if the assault be so violent,

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that he cannot retreat, without imminent danger, he is excused from so doing. If this means any thing, it is applicable to our case: for perhaps you can hardly imagine a more violent or more sudden assault. When to this is added the muscular debility of the defendant, it certainly forms a very strong case. He could neither fight nor fly. Had he attempted the latter, he must have been overtaken by his more athletic and active antagonist, and either knocked down, or maimed, or murdered, as the passions of that antagonist might dictate.

But it is said, and some passages from law books are read to prove it, that the necessity which excuses killing a man, must not be produced by the party killing; and that he must be without fault. You are then told, that the defendant sought the affray, and armed himself for it, and that he had been faulty in calling Mr. Austin, the father, opprobious names in the newspaper.

As to the affray being sought by the defendant, there is no evidence to support such an assertion, but what arises from his conversations with Mr. Richardson and Mr. Whitman, or from the fact of his having a pistol in his pocket. These only prove, that he was prepared to defend himself, if attacked; and if he did defend himself lawfully, this is the best evidence to show what was his intention: It cannot be presumed that he took the pistol with an unlawful intent, when he never expressed such intent, and when his subsequent conduct was lawful. He had been informed that he should be attacked by a bully; in such case what was his duty? Was he bound to shut himself up in his own house? Was he bound to hire a guard? If he had done so, this would have been urged as the strongest evidence of his intention to commit an affray. Could he obtain surety of the peace from a future assailant, whose name was unknown to him? Or was he bound to go about his business, constitutionally feeble and unarmed, at the peril of his life? There would be more colour for this suggestion, if the defendant had gone on the exchange and there insulted either old Mr. Austin, or his son, or voluntarily engaged in altercation with either of them. But he went peaceably about his ordinary business, and made use of his weapon only when an unavoidable necessity happened. A man when about to travel a road, infested with robbers, lawfully arms himself with pistols; if he should be attacked by a robber, and from necessity kill him, is he to be charged with having sought this necessity, because he voluntarily undertook the journey, knowing the danger that attended it, and took weapons to defend himself against it? As little is the defendant to be censured for going about his ordinary business, when he knew that it would be attended with danger, and arming himself for defence, in case such an emergency should happen, as that the laws could not af-

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ford him protection. I have here supposed that the pistol was taken for the purpose for which it was used; this however is far from being certain from the evidence, as it is in proof, that the defendant had daily occasion for pistols in passing between Boston and Medford, a road that has been thought attended with some danger of robbery; and that he sometimes carried pistols in his pocket. There is not the least pretence for saying, that he expected an affray with young Mr. Austin. He could not presume that his father would employ him; and it is not probable that he knew him in the confusion that the sudden attack must have produced. As to the publication in the newspaper against old Mr. Austin, though this might be in some sense a fault, yet it is far from being within the principle established by the books. When it is said the party must be without fault, it is evident that nothing more is meant, than that he must be without fault in that particular transaction. If we are to leave this and look back, where are we to stop? Are we to go through the life of the party to examine his conduct? If the defendant had libelled Mr. Austin, that was a previous and distinct offence, for which he was and yet is liable to an action or an indictment; and unless it be presumed without evidence and against all probability, that it was intended to produce this affray it can have no connection with the principle stated. There is another obvious motive for it, and there is nothing in the evidence tending to convince you that it was intended to provoke an attack: The defendant had been defamed; retaliation was the natural punishment; and there is no reason to presume that any thing more was intended, unless it was to blunt the shafts of calumny from Mr. Austin, by destroying his credit and standing in society. It is true, that it is said by several respectable compilers of law that the party killing must be without fault; but they all refer to one adjudged case, which is found stated in 1. Hale's P. C. page 440.

By recurring to the statement of this case it appears, that the persons who killed, and would have excused it on the ground of necessary self defence, had forcibly entered and disseized the rightful owner of a house, and continued forcibly to detain it against him; in an attempt by the owner forcibly to recover possession; those, who held wrongfully, were reduced to the necessity of killing; and it was holden, that as they were then engaged in an unlawful act, namely, forcibly detaining the house against him who had a right to enter, they had produced this necessity by their own wrongful conduct, and therefore it should not excuse them.

So that this principle seems to be related to another and in reality to be involved in it; I mean the well known principle that he who kills another by accident, while performing an unlawful

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act, is guilty of manslaughter. It would be absurd, that a man who kills by accident, while peforming an unlawful act, should be guilty of manslaughter; and yet that he who kills, from design, while performing an unlawful act, however necessary it may have become, should be guiltless. It is settled that if on a sudden affray, A make an assault on B, and afterwards the assaulter be driven to the wall, so that he can retreat no farther, and then kill B necessarily in his own defence, that is excusable homicide in A; and yet here A was in fault in this very affray, by making the first assault; but having afterwards retreated as far as he could, the law extends to him the right of self-defence. This shews that unless at the moment of killing, the party be doing wrong, the principle contended for on the other side does not apply. In proof of this I will also read to you an authority from 1st Hale's P. C. 479. "There is *malice* "between A and B, they meet casually, A assaults B and drives "him to the wall, B in his own defence kills A. This is *se defen-* "*dendo*, and shall not be heightened by the *former malice* into mur- "der or homicide at large; for it was not a killing on the "former malice, but upon a necessity imposed upon him by the "assault of A.

"A assaults B and B presently thereupon strikes A without "flight, whereof A dies; this is manslaughter in B and not *se* "*defendendo*. But if B strikes A again, but not mortally, and "blows pass between them, and at length B retires to the wall, "and being pressed upon by A, gives him a mortal wound, "whereof A dies, this is only homicide *se defendendo*, although "that B had given divers other strokes that were not mortal be- "fore he retired to the wall or as far as he could. But now sup- "pose that A by malice makes a sudden assault upon B, who "strikes again and pursuing hard upon A, A retreats to the "wall, and in saving his own life, kills B. Some have held this "to be murder, and not *se defendendo*, because A gave the first "assault, *Cromp. fol* 21 *b.* grounding upon the book of 3 *Edw.* 3 "*Itin. North. Coron.* 287; but Mr. Dalton, *ubi supra*, thinketh it "to be *se defendendo*, though A made the first assault *either with* "*or without malice*, and then retreated."

I am bound in candor to add, that the law, as above laid down, on the authority of Dalton, has since been doubted as to that part of it which supposes previous malice. This passage has been reviewed by Hawkins and East in their several treatises on crown law, and I have chosen to read it from this very circumstance, because it appears that it has been well considered; and when subsequent and eminent writers on full examination reject a part, and admit the residue to be law, it is strong confirmation of that residue. It is that alone on which I rely, and it is

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amply sufficient to prove, what I have before stated; that if A first assault B on a sudden affray without malice, A may still excuse killing B from a subsequent necessity in his own defence; and yet none will deny that first assaulting B, though without malice was a fault.

On this point, I submit to your consideration one further remark. The publication in the newspaper is nothing more than provoking language; now if the defendant had immediately before the affray, made use of the same language to old Mr. Austin, no lawyer will pretend that this would have been such a fault as would have precluded the defendant from excusing himself for the subsequent necessary killing on the principle of self-defence. If it were so, we should find it so stated in books of authority that treat on this subject; for the case must often have happened, as provoking language generally precedes blows. On the contrary, we find it settled, that even making the first assault does not deprive the party of this defence. It would be absurd then to say, that rude and offensive language, which cannot even justify an assault, should produce this effect. It can hardly be necessary to add, that, if these words, spoken at the moment, would not have deprived the defendant of this defence, having published them before, in a newspaper, cannot produce this consequence.

I have hitherto admitted that the publication in the newspaper was a fault in the defendant; nor am I disposed entirely to justify it; yet circumstances existed which went far to extenuate it. He had been defamed on a subject, the delicacy of which, perhaps, will not be understood by you, as you are not lawyers, without some explanation. Exciting persons to bring suits is an infamous offence, for which a lawyer is liable to indictment; and to be turned away from the bar. It is so fatal to the reputation of a lawyer, that it is wounding him in the nicest point, to charge him with it. It is the point of honor; and charging him with barratry, or stirring up suits, is like calling a soldier a coward. Mr. Austin, the father, had accused the defendant, publickly of this offence, respecting a transaction in which his conduct had been punctiliously correct; the defendant first applied to him in person, and with good temper, to retract the charge; afterwards in conversations with Mr. Welsh, Mr. Austin acknowledged the accusation to be false, and promised to contradict it as publickly as he had made it; yet he neglected to do it; again he said he had done it; but the fact appeared to be otherwise. This induced the defendant to demand a denial of it in writing; though Mr. Austin privately acknowledged he had injured Mr. Selfridge, yet he refused to make him an adequate recompence, when he neglected to make the denial as public as the charge. This was

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a state of war between them upon this subject, in which the more the defendant annoyed his enemy, the less power he had to hurt him. It was therefore a species of self-defence; and Mr. Austin, who had first been guilty of defamation, perhaps had little cause to complain. To try the correctness of this, we will imagine an extreme case.

Suppose a man should have established his reputation as a common slanderer and calumniator, by libelling the most virtuous and eminent characters of his country, from Washington and Adams, down through the whole list of American patriots; suppose such a one to have stood for twenty years in the kennel, and thrown mud at every well dressed passenger; suppose him to have published libels, 'till his stile of defamation has become as notorious as his face, would not every one say, that such conduct was some excuse for bespattering him in turn?

I do not apply this to any individual; but it is a strong case to try a principle; and if such conduct would amount almost to a justification of him who should retaliate, will not the slander of Mr. Austin, against Mr. Selfridge, furnish some excuse for him?

It has also been stated to you, gentlemen, and some books have been read to prove it, that a man cannot be justified or excused in killing another in his own defence, unless a felony were attempted or intended. Some confusion seems to have been produced by this, which I will attempt to dissipate. It has been settled that if a felony be attempted, the party injured may kill the offender, without retreating as far as he safely can; but, that if the offence intended, be not a felony, he cannot excuse the killing in his own defence, unless he so retreat, provided circumstances will permit. On this principle, all the books that have been read to this point, may easily be reconciled. But the position contended for by the opposing counsel, is in direct contradiction to one authority which they themselves have read. In the fourth volume of Blackstone's Commentaries, page 185, the law is laid down as follows—"The party assaulted must therefore flee as far as he "conveniently can, either by reason of some wall, ditch, or other im-"pediment, or as far as the fierceness of the assault will permit him: "for it may be so fierce as not to allow him to yield a step, with-"out manifest danger of his life or enormous bodily harm; and "then in his defence he may kill his assailant instantly And "this is the doctrine of universal justice, as well as of the muni-"cipal law." Also, in 1 Hawkins Pleas of the Crown, chap. 29, sect. 13," the law on this point is stated thus: "And now I "am to consider homicide *se defendendo*, which seems to be where "one, who has no other possible means of preserving his life from "one who combats with him on a sudden quarrel, or of defending

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" his person from one who attempts to beat him, (especially if " such attempt be made upon him in his own house) kills the " person by whom he is reduced to such an inevitable necessity." From these two highly respectable authorities, it appears, that, tho gh nothing more be attempted than to do great bodily injury, or even to beat a man, and there be no possibility of avoiding it, but by killing the assailant, it is excusable so to do. When the weight and strength of the cane, or rather cudgel, which the deceased selected is considered, and the violence with which it was used, can it be doubted that great bodily harm would have been the consequence, if Selfridge had not defended himself? The difference between this weapon and the pistol made use of by the defendant, perhaps, is greatly exaggerated by the imagination. The danger from the former might be nearly as great as from the latter: when a pistol is discharged at a man, in a moment of confusion and agitation, it is very uncertain whether it will take effect at all; and if it should, the chances are perhaps four to one, that the wound will not be mortal. Still further, when the pistol is once discharged, it is of little or no use; but with a cane a man, within reach of his object, can hardly miss him; and if the first blow should prove ineffectual, he can repeat his strokes until he has destroyed his enemy.

If it were intended to excite contempt for the laws of the country, a more effectual method could hardly be taken, than to tell a man, who has a soul within him, that if one attempts to rob him of a ten dollar bill, this is a felony; and therefore esteemed by the law an injury of so aggravated a nature, that he may lawfully kill the aggressor; but that, if the same man should whip and kick him on the public exchange, this is only a trespass, to which he is bound to submit rather than put in jeopardy the life of the assailant; and the laws will recompense him in damages.

Imagine, that you read in a Washington newspaper, that on a certain day, immediately on the rising of Congress, Mr. A. of Virginia, called Mr. B. of Massachusetts, a scoundrel, for voting against his resolution; and proceded deliberately to cut off his ears. Mr. B. was armed with a good sword cane, but observed, that his duty as a citizen forbade him to endanger the life of Mr. A. for, that cutting off a man's ears was by law no felony; and he had read in law books that courts of justice were the only proper " vindices injuriarum," and that he doubted not, that by means of a law suit, he should obtain a reasonable compensation for his ears. What are the emotions excited in your breasts at this supposed indignity and exemplary patience of the representative of your country? Would you bow to him with profound re-

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spect on his return? Or rather, would not his dignity and usefulness, by universal consent, be lost forever?

We have now taken a view of the facts, and the positive rules of law, that apply to them; and it is submitted to you with great confidence, that the defendant has brought himself, within the strictest rules, and completely substantiated his defence, by shewing that he was under a terrible necessity of doing the act; and that by law he is excused. It must have occurred to you, however, in the course of this investigation, that our law has not been abundant in its provisions for protecting a man from gross insult and disgrace. Indeed it was hardly to be expected, that the sturdy hunters, who laid the foundations of the common law, would be very refined in their notions There is in truth much intrinsic difficulty in legislating on this subject. Laws must be made to operate equally on all members of the community; and such is the difference in the situations and feelings of men, that no general rule, on this subject, can properly apply to all. That, which is an irreparable injury to one man, and which he would feel himself bound to repel even by the instantaneous death of the aggressor, or by his own, would be a very trivial misfortune to another. There are men, in every civilized community, whose happiness and usefulness would be forever destroyed by a beating, which another member of the same community would voluntarily receive for a five dollar bill. Were the laws to authorize a man of elevated mind, and refined feelings of honour to defend himself from indignity by the death of the aggressor, they must at the same time furnish an excuse to the meanest chimney sweeper in the country for punishing his sooty companion, who should fillip him on the cheek, by instantly thrusting his scraper into his belly. But it is too much to conclude, from this difficulty in stating exceptions to the general rule, that extreme cases do not furnish them. It is vain, and worse than vain, to prescribe laws to a community, which will require a dereliction of all dignity of character, and subject the most elevated to outrages from the most vile. If such laws did exist, the best that could be hoped, would be, that they would be broken. Extreme cases are in their nature exceptions to all rules; and when a good citizen says, that, the law not having specified them, he must have a right to use his own best discretion on the subject; he only treats the law of his country in the same manner in which every christian necessarily treats the precepts of his religion. he law of his master is "resist not evil" "if a man smite thee on one cheek turn to him the other also." No exceptions to these rules are stated; yet does not every rational christian necessarily make them? I have been led to make these observations, not because I think them necessary in the defence of Mr. Selfridge; but because

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I will have no voluntary agency in degrading the spirit of my country. The greatest of all public calamities, would be a pusillanimous spirit, that would tamely surrender personal dignity to every invader. The opposing counsel have read to you, from books of acknowledged authority, that the right of self-defence was not given by the law of civil society, and that, that law cannot take it away. It is founded then on the law of nature, which is of higher authority than any human institution. This law enjoins us to be useful, in proportion to our capacities; to protect the powers of being useful, by all means that nature has given us, and to secure our own happiness, as well as that of others. These sacred precepts cannot be obeyed without securing to ourselves the respect of others. Surely, I need not say to you, that the man who is daily beaten on the public exchange, cannot retain his standing in society, by recurring to the laws. Recovering daily damages will rather aggravate the contempt that the community will heap upon him; nor need I say, that when a man has patiently suffered one beating, he has almost insured a repetition of the insult.

It is a most serious calamity, for a man of high qualifications for usefulness, and delicate sense of honor, to be driven to such a crisis, yet should it become inevitable, he is bound to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God. Whatever may be the consequences, he is bound to bear them, to stand like mount Atlas,

> "When storms and tempests thunder on his brow,
> "And oceans break their billows at his feet"

Do not believe that I am inculcating opinions, tending to disturb the peace of society. On the contrary, they are the only principles that can preserve it. It is more dangerous for the laws to give security to a man, disposed to commit outrages on the persons of his fellow citizens, than to authorize those, who must otherwise meet irreparable injury, to defend themselves at every hazard. Men of eminent talents and virtues, on whose exertions, in perilous times, the honor and happiness of their country must depend, will always be liable to be degraded by every daring miscreant, if they cannot defend themselves from personal insult and outrage. Men of this description must always feel, that to submit to degradation and dishonor, is impossible. Nor is this feeling confined to men of that eminent grade. We have thousands in our country who possess this spirit; and without them we should soon deservedly cease to exist as an independent nation. I respect the laws of my country, and revere the precepts of our holy religion; I should shudder at shedding human blood; I

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would practice moderation and forbearance, to avoid so terrible a calamity; yet, should I ever be driven to that impassable point, where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honor.

It has been intimated, that the principles of christianity condemn the defendant. If he is to be tried by this law, he certainly has a right to avail himself of one of its fundamental principles. I call on you then to do to him, as in similar circumstances, you would expect others to do to you; change situations for a moment, and ask yourselves, what you would have done, if attacked as he was. And instead of being necessitated to act at the moment, and without reflection, take time to deliberate. Permit me to state, for you, your train of thought. You would say this man, who attacks me, appears young, athletic, active and violent. I am feeble and incapable of resisting him; he has a heavy cane, which is undoubtedly a strong one, as he had leisure to select it for the purpose; he may intend to kill me; he may, from the violence of his passion, destroy me, without intending it; he may maim or greatly injure me; by beating me he must disgrace me. This alone destroys all my prospects, all my happiness, and all my usefulness. Where shall I fly, when thus rendered contemptible? Shall I go abroad? Every one will point at me the finger of scorn. Shall I go home? My children—I have taught them to shrink from dishonor; will they call me father? What is life to me, after suffering this outrage? Why should I endure this accumulated wretchedness, which is worse than death, rather than put in hazard the life of my enemy.

Ask yourselves whether you would not make use of any weapon that might be within your power to repel the injury; and if it should happen to be a pistol, might you not with sincere feelings of piety, call on the Father of Mercies to direct the stroke?

While we reverence the precepts of christianity, let us not make them void by impracticable construction. They cannot be set in opposition to the law of our nature; they are a second edition of that law; they both proceed from the same author.

Gentlemen, all that is dear to the defendant, in his future life, is by the law of his country placed in your power. He cheerfully leaves it there. Hitherto he has suffered all that his duty as a good citizen required, with fortitude and patience; and if more be yet in store for him, he will exhibit to his accusers an example of patient submission to the laws. Yet permit me to say in concluding his defence, that he feels full confidence that your verdict will terminate his sufferings.

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ATTORNEY GENERAL.

May it please your Honor, and you, Gentlemen of the Jury,

It is my official duty to close this cause on the part of the Government.—If I can perform this duty by a simple, accurate and intelligible arrangement of the facts, and a just and pertinent application of the legal principle by which they are governed, I shall be satisfied.

I will not play the orator before you, or pretend to make a speech if I was capable. I would not do it on this occasion.

Circumstanced as I am, nothing but my duty could induce me to undertake the task. No pecuniary reward could engage me in the cause. Nothing, I repeat it, but the sense I have of my official duty and a compliance with the public expectation, could induce me to appear this day before you on this occasion. But, I thank God, that through a course of what may be called a long life, I have had firmness to do my duty when I had a duty to do.

The prosecution of this cause on the part of the Government has been conducted in every respect similar to prosecutions in other cases on like occasions. When it was said, that one of our fellow Citizens, in the open street, at noon-day, had undertaken to destroy the life of another, it was necessary to inquire by what authority he did it; what legal process or warrant of law he had for conduct of such consequence to the public, as well as to an individual citizen.

Is there any cause of wonder that on the day it happened, he should be apprehended and carried before a Magistrate, who exercised the same power in this particular as he would have been obliged to do had it been the case of either of you gentlemen of the Jury, or of any other member of the community?

The Magistrate found the killing to have been voluntary and not occasioned by any accident: what ought the Magistrate to do? was he to undertake to decide the difficulties which you have to encounter in this cause? was he to undertake to say that the act of killing amounted to murder, or manslaughter, or to justifiable or excusable homicide?

The Magistrate was bound to commit him to take his trial, to which he is now brought. Was there any thing wrong in this? if there was, he had the remedy in his own power. The Supreme Court upon a *Habeas Corpus* might have set him at liberty; it is a writ of right, and would have been granted if by law it ought, as of course if he had applied for it. If he chose to decline the application and lay in prison, he had his reasons for it. He as a lawyer must have known the consequences. Would not every other man in the community have had to suffer a like inconvenience with that sustained by the Defendant under similar circumstances? Certainly they would. Why then this warm and eloquent address to the passions and feelings of the public? Do they expect to influence you, gentlemen of the Jury, and divert your attention from the just-

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ness of the case by an appeal to the feebleness of his health and the weakness of his person ? Is it to injure the reputation of the officer, who, *ex officio*, moved the commitment of the Defendant to prison, that his counsel apply to your compassion and tender feelings ? Be it so, but I hope that I shall continue conscientiously to discharge the duties of my public function, regardless of every other consideration, than that of the duty which I owe the Commonwealth.

It is said, that a great crowd has attended the court during this trial, and we are asked the reason—many, I suppose attend from curiosity. Is it to be wondered at that a crowd attended also at the exchange, on the day, that the Defendant shot the young man in State Street ? The human mind naturally shudders at death, and when a man destroys his fellow citizen, it naturally draws the attention of all men to the fact ! The insinuation respecting a crowd in this court room, seems to glance at party spirit, but had party spirit any thing to do with the crowd that assembled on the exchange ? When one man has struck another out of being, so far as being depends upon his existence in this world, is it marvellous that the public attention should be on tiptoe on this occasion ? Is the agitation any thing more than the effect of nature's law ? Is it any thing more than the uniform principle of our holy revealed religion ? Is it not the voice of God ?

It is true, when the crowd assembled in State-street, an inquiry was made—who was the man that did this ? The Defendant boldly stood forth, and said. I am the man ; and it appears that he raised himself in the middle of the crowd to make the declaration. He had courage in the midst of this universal cry of who is the man that has done this, to stand forth and avow himself the perpetrator. But courage is not the criterion of truth, this firmness of nerve, this unexampled boldness has not changed the nature of the crime, nor can it give us the law to govern the fact. Does the definition of offence or the rights of men in civil society depend on the character of individuals, or the different constitutions of men ?

The question before you, is this, has the Government produced evidence to convince you *beyond a reasonable doubt*, that the Defendant killed Charles Austin, in the manner and form as set forth in the indictment. If you are satisfied of this question, then the burthen of the cause has devolved upon you, and you must undertake it, whatever may be the consequences.

If you are *not* satisfied of this fact, there is no further inquiry to be made, but if you *are*, then there is a second question. Has the Defendant shown you *beyond a reasonable doubt*, that the fact of killing, independent of any previous circumstances against him, attached to it, was done in such a manner as will render the killing lawful, and excuse him from any share of guilt.

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Why this devolves upon him I will show from an authority in which it is better expressed than I can express it in my own language. Fost. C. L. 255.

"In every charge of murder, *the fact of killing being first proved*, all circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The Defendant in this instance standeth upon just the same foot that every other Defendant doth, the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

And why must it devolve upon him? Because if he had a legal warrant he could produce it.—Whether there was malice or not, in killing, upon any other than legal authority, depends upon the feelings of the heart, and no man can be so well acquainted with them as the person who perpetrates the act. I will adduce another authority to the same point from 1 East. C. L. Byrne Ed. 224.

"The implication of malice arises in every instance of homicide amounting in point of law to murder: and in every charge of murder, the fact of killing being first proved all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him."

The question you have before you is, whether the Defendant has proved either accident, or necessity, as fully as the Government has proved the fact of killing? If *he has* not, he is guilty of the homicide charged in the indictment. Has he proved circumstances that will reduce it to excusable homicide? or that he has done nothing but what he had a right to do. If there was any premeditation a share of blame attaches itself to the fact, though it were but momentary: the law makes it a crime in that case, and it cannot be less than manslaughter; but if the Defendant has proved beyond a reasonable doubt by the evidence he has offered, or what arose out of the evidence offered on the part of the Government, that the fact of killing, in the manner it was committed, independent of any previous circumstances attached to, or explanatory of it, was excusable homicide, yet if the Government has given convincing proof of a premeditation his excuse cannot avail him.

First, have we proved the fact of killing? that is admitted to be proved beyond a doubt. And you have secondly to inquire, whether the Defendant has given evidence to justify what he has done, or to shew it to be excusable from a legal necessity. Thirdly, you will inquire whether the government has given evidence of such facts and circumstances previous to the transaction as will take from the Defendant all his claim of excuse and render him guilty of a felonious homicide.

These three questions include every fact and every principle of law that can arise in the cause. They will embrace and call into examination every circumstance which has been given in evidence

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by the witnesses, and every principle of law by which the facts are to be governed and decided upon.

This cause is an important one, and presents to our discussion a question of principles: It is of no consequence who are the parties, or what the facts are, on which the issue rests, otherwise than to call into examination the principles that are to guide you to a verdict. It would be desirable to lay out of the question the persons of the deceased and the Defendant; and to consider the cause in the abstract, as if between persons of whom you had never before heard. The principles on which this cause is to be tried, must stand or fall by themselves, without any regard to the parties. The principles upon which the issue rests must be fixed and determinated.

Without fixed and permanent principles, religion itself is a delusion. Morality is a cheat. Politics are a source of oppression and cruelty, and the forms of law but the vehicle of corruption, the mask of chicane and injustice.

Principles are no other but the primordial nature of things upon which systems are predicated, for the use and happiness of rational nature; without those, all is insecurity and confusion; the world is a waste, society is a curse, and life itself but a dream of misery. While religion, founded in the self existence of the Deity, and the relation of man to the Divine nature. While morals, predicated upon the connexion between man and man, as brethren, while stubborn nature, fixed on eternal and unchangeable laws, deny to yield to man the inflexibility of their principles, he is left to raise, for himself, those systems of civil social government, and jurisprudence, which are best adapted to his situation, and circumstances, and in this society is left to decide for its self.

When the sovereign will of the civil community has arranged these, the obligation of each member to submission, becomes a moral obligation, crimes result from disobedience, to disobedience penalties must be attached.

Despotism is adapted to a state of savage barbarity, where fear is the only motive to action or forbearance; yet even there, the will of the people, let it be founded in what it may, either in prudence, or in cowardice, is the foundation of the sovereignty.

A monarchy and aristocracy, mixed together to form a government, supports a state of servile dependance, where the hopes of favour and interest exclude the idea of reward for merit, bring patriotism and public virtue into base contempt, and render fraud, deceit, chicane and cunning, the insolent claimants of the rights of truth, talents and integrity.

In a free government only, it is that principles, founded in the nature of social virtue, can claim the decision of what is right between man and man, or between an individual and civil society, without the corruptions arising from the destruction or irregularity of rights and privileges, from party distinctions, from the frauds of

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chicanery, incident to factitious morals, and cunningly devised systems of religion and policy.

I will not spend any more of your time by such an appeal as has been made by the counsel for the Defendant, who have preceded me. I will not invoke you to put aside your prejudices, if you have any; an appeal on this head is altogether nugatory, for if you will not obey the obligation which devolves upon you, from your situation resting on your consciences by the sacred solemnity of an oath, you are not to be reasoned into it, by the powers of rhetoric, I therefore consider it as improper to attempt it. I conceive that it must necessarily follow from the circumstances of your situation, that a verdict will be given upon the facts according to the rules of Law. To a jury, acquainted with the obligation of an oath, a caution against being led astray by their prejudices, is to caution them against acting corruptly, and against doing wilfully wrong; if their oath cannot guide their consciences, I should despair of guiding them by any thing that I can say. I should have spared myself these observations as altogether irrelevant to the issue, had not the Defendant's counsel gone largely and learnedly into the subject, and urged you to do your duty free from the influence of party prejudices, regardless of the clamours of News-paper writers, or addresses to the people. In this caution, the counsel for the Government heartily concur.

The misconduct of News-papers, in publishing matters relative to a trial, while it is pending, is to be deprecated; so is all conversation tending to spread false reports; yet such are the feelings of mankind, throughout the world, that they will talk and also print on such subjects where the press is free: It is one of those alloys, which mingle with the precious metals. Better it is to enjoy the freedom of the press, though attended with this inconvenience, than to restrain it by governmental laws, as is the case in every other Country. The impressions made in that way, are very inconsiderable; the enlightened minds of this jury are above all considerations, arising from that source, whatever you may have heard out of doors, is left at the threshold of this sanctuary of justice, and passes by like the idle wind, and is no more regarded than the whistling of a school boy, trudging along with his satchel in his hand. As the report of this cause will probably be published, the world will judge how far your decision is made up from the testimony you have heard at this bar; they will know how to estimate the various reports you have heard, and the News-paper clamours, and artfully devised handbills; these, with the papers themselves, will be consigned ultimately to the neglect they deserve.

One man has killed another; the law of God, and of our Government calls upon you to inquire, if he can excuse himself. This is no light subject. There is an omniscient judge before whose seat we shall all appear to answer for our conduct on this solemn day.

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We must therefore decide with purity and integrity, if we expect to avoid the judgment pronounced against those who corrupt the tribunals of human justice.

I will place a mirror before your eyes, by which each of us may compare the fairness and justice of his intentions in the case, and perceive how far he is misled by his prejudices, or political principles.

Suppose the slander, which is said to be traced to the father of the deceased, was correct, and suppose B. Austin to have gone forth armed with a deadly weapon in expectation of an assault from Selfridge, or his friends; that Selfridge had made an attack on him as young Austin did on Selfridge, and Austin the father had, with the weapon (carried as Selfridge carried his) killed him, at noon day in a crowded street, what would be your verdict on such a case? I flatter myself, your verdict would be the same as that which you will give in this cause. This is the standard of security, this the solid tenure, by which our fellow citizens hold their equal right to public justice, ensured to us by our Constitution and our Laws.

The counsel for the Defendant has addressed you with warmth and energy, as a politician; he supposes you to consist of two conflicting parties, and with elegance of manner, and strength of language, peculiar to himself, he has conjured you to lay aside all political impressions, whether they be favourable to the federal republican, or democratic party, he particularly addressed himself to those who are of the same way of thinking as himself. I will imitate him in some degree, but I will address you as being all of the same way of thinking as myself; for I believe none of you wish to subvert the government or infringe the law: If then, you mean to support our happy constitution, and obey the dictates of our holy religion, you are of the same party as myself. Would you break up the foundation of the great deep, and destroy the basis of the present federal government, and leave it to chance, when or how we should obtain another? (you may think the present constitution might be made better, but yet it might be made worse, and though like other human inventions, it has its imperfections) you would not unnecessarily encounter the hazard: I say then you are all of my party. If you prefer our democratic government, to a monarchy, an aristocracy, or a mixed government, then we all think alike. Is there one of you who would alter our system of jurisprudence, or relinquish the inestimable right of trial by jury; if there is not, then you all think as I do. If there is one of you who think the millions of money expended at the city of Washington in the public buildings, and improvements, for the accommodation of the general government, which serves to tie the several states of this continent in the indissoluble knot of perpetual union and amity; if you think that money well employed as a mean of producing that grand effect,

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think so likewise. Is there one of you but believes the State House on Beacon-hill, was intended for, and will produce the happy purpose of combining the interests of the several parts of the state of Massachusetts? Although attended with expense, it may prove a blessing. All of you join in this belief. I also am of your opinion (the gentlemen who are strangers, and reporting this cause, will pardon me for being so local: they are not perhaps acquainted with our domestic politics; but I love and feel for my native state; and the circumstance I have alluded to, has been of importance.) If you think of our union at home, and our foreign relations, as Washington the great and good thought, and as he has written in his farewell address to the citizens of the United States, you will engrave it on the tablet of your memory, teach it to your children, and bind it as a talisman to your heart, in order to perpetuate the freedom of our common country to the end of time.

Is there one of you who would engage your country in foreign wars, in order to benefit a few great men who would become the leaders, as they have been the agitators of such a desperate measure? The consequences of war are known to many who hear me; never more do I wish to see the parched earth of my country drenched with the blood of my fellow men: the tender mothers, wives and children, flying from their dwellings into the wilderness, to escape the foe. You, gentlemen of the jury, are friends to the peace of your country, and therein I cordially join with you. I address you as the lovers of your country, and there is no difference in our opinions.

To return from this episode to the question in the cause, I will proceed to inquire whether the fact of T. O. Selfridge's killing young Austin, is proved by the Government. That catastrophe has been clearly made manifest by the testimony of Doctor Danforth, Edward Howe, John Lane, Ichabod Frost, Isaac Warren, and many others. I will not attempt an argument on it.

The second question is, has the Defendant shown you, beyond a reasonable doubt, that the fact of killing was done under such circumstances, as that it was lawful, and he is excuseable of blame?

In this enquiry (and certainly, it is an important one) we must have some guide, some settled rule, some law, some known, established principles, or society no longer exists. A confused state of nature reigns! every man's arm, his art or his cunning is his own safety! and every man is the avenger of his own wrongs.

Had I the sentiments expressed by my learned brother (Dexter) feeble and imbecile as I am, I would go forth from day to day in arms, trusting in mine own arm alone, with the aid of such weapons as my strength would bear: Magistrates should be avoided, and the volumes of laws become pavement for the soles of my shoes.

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Many things are said by professional men, in the feelings and warmth of debate, which, in their cooler moments, they would gladly retract. Upon the manner and measure of resentment or self-defence, is there no law fixed, but the different feelings of men? Are there men, nay, a multitude of men, who have a natural right, from their feelings, and a high sense of honor, to defend themselves, when and where others of less feelings could not do it in the same manner? And is this the voice of nature, which makes the exception? Is this sense of honor, and those feelings, a privileged exception to those individuals, above the rules of the gospel? Is the rule, Do to others as you would be done unto, reduced to the standard, that a juror, shall acquit the Defendant, if he believes he should have acted himself by the same motives, or been seduced by the same temptation? Is there then a distinction between the *would-be nobleman* and the chimney sweeper, (for I suppose these, from the distinction taken by the Defendant's counsel to be the Alpha and Omega, the head and the tail, of the links that form civil society.) Is there a distinction between them as to the privilege of self-defence? And is the push of the sweep, or a stroke with his scraper, at the head of his comrade, to be murder in him, whilst the *would-be noble*, shall be allowed with his gold-hilted cane, or his elegantly mounted pistol, in defence of his honor, to play a secure but mortal game, and be justified in killing, on a like provocation, either his friend or his foe, or, as in this case, a man he is said hardly to know? You are not then to determine his case by the circumstances attending it, but by the nice sense of honor of the gentleman, or the distinction and dignity of his station in life. ! !

What then has become of that part of the constitution which declares ours to be a government of laws, and not of men. If the law does not apply equally to A and B, and so through every letter of the alphabet, how can it be said that every man holds his life and fortune by the same tenure as his fellow citizens, whatever may be his rank or his condition, or standing, in society.

We are told that there are a number of men in society who will with their own arm vindicate their rights, and stand the guardians of their own honor. There may be such men, but I do not know them. I hope I shall not meet with any citizen who does not rely for his safety on the laws of the government, and the justice of civil society.

But we are told that the laws of christianity lend us a defence by our own arm; and we are asked how then the laws of society can regulate this matter? I do not admit this position to be just. All men are bound to surrender their natural rights upon entering into civil society, and the laws become the guardians of the equal rights of all men. Why, are duels criminal, if the men who engage in them have this privilege of maintaining their own honor.

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It is said the Defendant was driven to such an awful crisis, that he could not extricate his honor; and his counsel ask, what could he do? I answer, appeal to the laws. But say they, the laws are ineffectual; suits are slow of remedy, and uncertain in their end. Where would such reasoning lead us? You have it in testimony, that the Defendant reasoned in this way; and that mode of reasoning brought on this sad event. You have heard his counsel, in a strain of eloquence, advance the same idea, and make a personal application of the principle. "No man," said he, "is bound to surrender his own honor: If I do, I wish my arm may be shriveled by the palsy, and drop from its socket. No, I will vindicate mine own honor to the death." I would rather that he should retain the use of his limbs, as well as the faculties of his mind, in order to employ them in the true field of honor, the defence of his country, when necessity may require their exertion. The Defendant's counsel are obliged to adopt the same erroneous course of reasoning in order to justify him. Have we then, as a civil society, higher authorities than our own law books to appeal to, on such an occasion? Are they such as the counsel on the other side would not shrink from on the penalty of his life?

We will not take up the glove; we will rest our defence, both of the lives and honor of our fellow citizens, upon the laws of the land; we will trust to them rather than to a deadly weapon, for our protection. Such declarations as are made by the gentlemen on the other side, would countenance all the duels that have been fought in the world, and render unavailing all the laws that have been enacted for the punishment of illegal and savage combats. It is said that the Defendant adopted this course because the tardy steps of the law were too slow to keep pace with his rapid stride to obtain immediate vengeance. What if his fame and character had been injured? Has he superior privileges? Or, ought he not to take the common lot of his countrymen? Has he any excuse more than others? Has he the excuse even of an officer? He is both a lawyer and a gentleman; but this does not give him a right beyond what all the individuals of this society possess. If the Defendant suffers on this occasion, he will have to suffer no more than what every other person who should perpetrate a similar act must suffer, while controuled by the laws of his country. If he is innocent, he will be acquitted; if he is guilty, he will take the common lot of other men. I do not feel any interest in what your verdict may be, further than that justice in the common way, and on general principles, should be done.

Is the measure of a man's conduct, when he leaps the bounds of written established law, to receive a standard from the feelings of his wife and children, or the notions of honor in the congregation of fashionable men? and can a man appeal to heaven in this way, and be a pious christian? When I heard that this doctrine had been advised on this occasion, by professional men, I shuddered at it.

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Gentlemen—Not being able to fathom this abyss of troubled waters; not having the courage and firmness to cast away the guardianship of social protection, and the laws; not having an imagination that can show the lines of security beyond those of the civil government, I will yet believe the laws to be fully adequate, where we have time to apply to them; and I will fondly suppose that I am, to every possible purpose, in a state of civil society and social security. The laws may be so imperfect, for human nature is so, that the remedy may be slow, and below my wishes; but I will not claim to be my own judge; I will not say that I have a right to appeal to this arm to avenge an injury, whilst the law affords me a complete remedy. The defendant's counsel asks how he could have gone home to his wife and children, with his honour stained, by the blow he had received on the public exchange from young Austin. I put a case hypothetically: If a man of honor and great irritability of nerves, should have received a blow, could he appeal to the laws of his country without tarnishing his honor, or injuring his family? If his wife was a virtuous woman, she would applaud his moderation, and be gratified in teaching her children to pursue a similar course through their future lives; no person would deem him disgraced by the blow, though he had not destroyed his adversary. If we are to return to the barbarous times so well described by Robertson, in his history of Charles V, when every great man was to go armed with his trained bands behind him, in order to encounter any whom he might meet, without regard to laws either human or divine—If heroism and honour and chivalry are to return, we may expect to see again those combats so well described in the well known ballad of Chevy Chase; and this promised land, flowing with milk and honey, is to be turned into a field of battle, and crimsoned by the blood of our fellow citizens. I trust we are now too far advanced in civilization to return from the light of this day to the barbarisms of the 13th century, when the interposition of the authority of the Pope and his council became necessary in order to prohibit these misadventures. Whatever opinions we may have of the Roman Catholic religion, we are indebted to its influence for this one good deed, which all the potentates of Europe combined together could not have effected.

There is something in this cause which has unnecessarily been introduced, and which I wish to lay out of the question before we proceed: The gentleman on the other side is above personalities in a cause of this importance, but he draws a picture in the darkest colours, and leaves you to point to the original;—he says that some one has been standing in the gutter for twenty years past, throwing mud at every well dressed gentleman that passed by, and that he can have no ground of complaint if he should be a little spattered himself. I ask whether if it was true that a man had

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done this, is he to be outlawed? Is he and his family to be hunted and shot down at noon day? That is not the punishment for libels; if he is to be condemned for libelling, let the innocent man among his accusers cast the first stone. I have had my share of such opprobium, but it never came into my mind to redress myself by shooting one of my fellow citizens. He wrote against Washington, they say; so did Hamilton;—he wrote against Adams and others of his administration; so did Alexander Hamilton and others;—but Austin authorises me to deny the charge of his writing against Washington. Who wrote against Hancock and Samuel Adams and Washington and all the great men who produced the revolution? Are all those writers outlawed? If any of them were punished, it was in pursuance of the laws of the country—we have no check beyond that. Who is there of consequence enough to deserve notice, but is the object of daily slander? Does Benjamin Austin do all this?

Where will these ideas carry us? Are they compatible with the elegant expostulations of both my brethren against party political prejudice? I think they would carry us back to the barbarous ages; in which case it will become necessary for every man to become an expert combatant. These ideas will, I presume, excuse robbery in those who are too proud to beg. Should we lower our notions of honour, and condescend to bring our feelings to the rules of law, we should then have to enquire, ——

Whether the defendant has proved beyond a reasonable doubt, that the fact of killing was committed in such a manner as to render it lawful, and excuse him of all blame.

In this the first enquiry is—Was the death a voluntary killing? —that is to be decided by the weapon and manner. Was it by justifiable or legal warrant? was it an accident? was it on a sudden provocation? was it on a sudden combat? or was it done in pursuance of a design unlawful in itself, and unjustifiable by the established laws of our government? Should you be satisfied from the opinion of the Court, that it is of no consequence as the evidence is, whether the pistol was fired before a blow was given by the deceased, you will be much relieved; but if that fact should be considered as important in the case, you will then have to enquire

1st, Was the assault previous to the mortal wound,

2d, Was it at the same instant, or

3d, Was it after the mortal stroke.

In these enquiries, what shall guide you? Are you left to the nice feelings of a man of honour, to be decided on his apprehensions of the moment, and to make a separate law in each case as it arises?—or are these established laws to guide you? The constitution has fixed a system by which the courts of justice are to be governed:—these books which have been cited contain those

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laws, which are laws, though they were not made by the legislative authority; they were made by the voice of the people; and this, which is the highest authority, has said that these books shall be the law of the land: For this I refer you to the sixth section of the sixth chapter of the constitution, where it is declared that all the laws, rules and practices in the judiciary department, which have been heretofore adopted, shall continue to be law, until they shall be altered by the general court of this commonwealth.—They were brought by your ancestors from the land of slavery;—they have been wet with the mists of the red sea, washed in the waters of Jordan, and are now our garments of comfort in the promised land;—yes, in the promised land! You young men, who have only heard of the revolution, may smile at the simile, but the venerable and aged members of this community, many of whom I see around me, know what it was to have passed through the wilderness, through difficulties and dangers almost unparalleled; those will not willingly relinquish their principles.

By these rules, if the defendant entertained a grudge or ill will against the father of the deceased, can the malice in such a case be transferred to the son? if it should appear that the defendant went out armed with a deadly weapon, with an expectation of meeting the elder Mr. Austin, and did thereupon kill the son, it would be such a malice as to constitute the crime of manslaughter at least. On this point I will read from East's P. C. 231 Sect. 18.

"Homicide from a general malice or depraved inclination to mischief, fall where it may, the act itself must be unlawful, attended with probable serious danger, and must be done with a mischievous intent to hurt people, in order to make the killing amount to murder in these cases; for it is from these circumstances that the malice is to be inferred. But if an unlawful and dangerous act, manifestly so appearing, be done deliberately the mischievous intent will be presumed unless the contrary be shewn: Thus if a person, breaking in an unruly horse willfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal; it is murder. For how can it be supposed that a person willfully doing an act, so manifestly attended with danger, especially if he shewed any consciousness of such danger himself, should intend any other than the probable consequence of such an act. But yet if it appears clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, it is only manslaughter: though Hawkins considers it would be murder if the person intended to divert himself with the fright of the crowd. So if a man knowing that people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall with intent to do hurt to people, and one is thereby slain; it is murder on account of the previous malice though not directed against any particular individual; for it is no excuse since it appears that the party was bent upon mischief generally, but if the act were done incautiously, without any such intent which must be collected from the circumstances, it is only manslaughter. Again; if the killing happen in the prosecution of an unlawful act, as

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where the party comes with a general resolution to resist all opposition; to commit a riot, to enter a park and death ensue, upon such resistance, it would be murder, but this will be considered more fully in another place. To this point may be cited Foster 261, 262, 263 and 4 Black. 200. also Hawk. 74 ch. 29. Sect. 12. 3 Jus. 50.

Foster C. L. page 261. If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or mischief indiscriminately fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter; not accidental death. Because the act upon which death ensued was unlawful.

Upon this head I will mention a case, which through the ignorance or lenity of Juries, hath been sometimes brought within the rule of accidental death, it is where a blow aimed at one person lighteth upon another and killeth him. This in a loose way of speaking may be called accidental with regard to the person who dieth by a blow not intended against him. But the law considereth this case in a quite different light. If from circumstances it appeareth that the injury intended to A, be it by poison or any other means of death, would have amounted to murder supposing him to have been killed by it, it will amount to the same offence if B happeneth to fall by the same means. Our books say that in this case the malice egneditun parsanam. But to speak more intelligibly, where the injury intended against A proceeded from a wicked, murderous, or mischievous motive, the party is answerable for all the consequences of the action, if death ensueth from it, though it had not its effect upon the person whom he intended to destroy. The malitia I have already explained, the heart regardless of social duty and deliberately bent upon mischief, and consequently the guilt of the party is just the same in the one case as in the other. On the other hand if the blow intended against A and lighting on B arose from a sudden transport of passion which in case A had died by it would have reduced the offence to manslaughter, the fact will admit of the same alleviation if B should happen to fall by it.

Now we come to an examination of the testimony which has been laid before you, and from which you will have to determine the degree of guilt incurred by the defendant.

Was the assault of young Austin made upon Selfridge previously to the firing of the pistol, that instrument which gave the mortal wound? To this point we have the testimony of John M. Lane and Job Bass. I will make one or two observations on Lane's evidence. Mr. Lane said he was standing in his shop door and saw Selfridge fire the pistol and the person who was fired at raised the stick and struck at Selfridge after the pistol was discharged.

The evidence of shooting before the blow was, is from the testimony of Bass and Lane (here the Attorney General recited the testimony of those two witnesses for which see pages 35 and 56.

Howe, Frost and others say they did not see any blow struck before the pistol was fired, but perhaps these two witnesses will be sufficient to satisfy your minds that the deadly wound was given before a blow was struck, and there is a distinction in law between an as-

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sault and battery. The counsel for the defendant have attempted to disparage the testimony of Mr. Lane, without intending to impeach his moral character. Mr. Lane's standing in society is above imputations of that sort, for my part I am astonished that the circumstances of this case should not have been attended with greater variations then they appear to have from the witnesses on both sides. It is an extraordinary thing in a scuffle of this kind at noon day, on the public exchange, done on the sudden, that the testimonies should come so near together as they do in respect to the time, place, &c. I shall not however insist that the pistol was fired before the assault was made.

I come now to the second question whether the killing and the blow were at the same instant of time, and here you have the testimony of a number of witnesses to prove that both happened at the same moment, (the Attorney General here referred to the testimony, and read several extracts from those of Edward Howe, I. Frost, J. Warren, J. Bailey, Z. French, R. Edwards, H. Bass, and John Erving) which testimonies the reader will find stated at large in pages 36, 50, 51, 53, 54, 56, 57, and 59.

I do not deny that from their testimonies, an assault may be inferred, and that there was an intention on the part of young Mr. Austin to commit a battery, but I do deny that it was such an assault as would justify the defendant in putting the assailant to death with a deadly mortal weapon prepared and charged on premeditation for the purpose.

I now come to the consideration of another point that the blow was given by Mr. Austin before the defendant gave the mortal wound. On this head you have only the solitary testimony of Lewis Glover, I know nothing of his prejudices or party feelings, for he is quite a stranger to me; while on the stand, he told you that he had expected something would take place in the course of the day between Selfridge and Austin, the father of the deceased, that he meant to amuse himself by attending the exhibition. As in former days the Romans had gladiators to amuse the public, so this witness watched the parties that he might see them sink below the character of men, he owns however that he might have been better employed; there I agree with him, I think he would have been better employed if he had gone to a magistrate and apprised him of his suspicions, in which case the magistrate would have taken a necessary precaution to prevent the town of Boston being disgraced by actions of this kind. He says that he saw the deceased give one violent blow, which struck Selfridge on the hat, that he recovered his cane in order to repeat the stroke, and that the second blow and pistol went together. This I say is the solitary testimony of Glover, unless you take the testimony of Mr. Wiggin as a corroberation of it; and even then, there are upwards of

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thirty others who were present at the time that know nothing of the circumstance. Mr. Wiggin has said that he thought he heard a blow which sounded as if it had been struck upon a coat; Mr. Glover may be right and Mr. Wiggin correct, their stories are consistent; for Glover says the first blow was not so severe as those which followed, therefore its sound might be softened, there is another circumstance urged in the defence as going in support of this testimony. The defendant's hat was indented and broken, and there was a contusion on his forehead. This is answered in this way, all the witnesses agree in the fact, that the subsequent blows were given with increased violence, so much so that several of the witnesses thought the charge had not taken effect, or the pistol had been only loaded with powder. You have heard the opinion of the Physicians, and you learn from them that a wound in the lungs is not always mortal. They have mentioned a case where a part of the lobe of the lungs has been separated and the patient survived; you have heard of animals being mortally wounded, and yet leaping from the ground, with increased muscular strength 6 or 8 feet high. Similar observations must be familiar to every one of you gentlemen, even the worm that you crush beneath your feet, springs with manifest vigour from the assault; we need no argument in support of these remarks; give pain to a fly or a spider, and you have occular proof. Have we not then very full proof that this fracture of the hat and contusion of the forehead was the consequence of one or more of the blows subsequent to the discharge of the pistol? In that case as it must have been done after the pistol was fired and the deceased had received his death wound, however grievous and heavy the stroke might be, it furnishes no excuse for a mortal wound previously given.

I am requested to make an observation upon the testimony of young Mr. Fales, the favourite and classmate of the deceased; I do this merely because it is desired, not because it is necessary. The Court and you have already seen that his testimony is correct, it is on facts which happened on the agitation of hurry and confusion, and can only be according to the best of his recollection.

The defendant has brought Perkins Nichols and J. Osborn, in order to discredit the testimony of young Fales; they say that they went to Mr. Austin's house, not I apprehend as the friends of Mr. Austin, to condole with him on the unfortunate death of his son, but to find and lay hold of any circumstance that might be beneficial at this trial, to their friend Selfridge; one of them, Mr. Nichols, made a memorandum of the conversation that had taken place, and he swears from that memorandum, that Mr. Fales had said that the young man (meaning Mr. C. Austin) struck Selfridge before the pistol was fired; that at the time of this conversation, Mr. Fales appeared to be extremely agitated. There

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are two other witnesses, however, who were present at the same time, that declare that they did not hear any such declaration. But suppose such a declaration had been made by Mr. Fales to the father of the deceased, can it not be accounted for by supposing that Mr. Fales, in order to soothe the parent, who perhaps was half distracted at the horrid circumstance, that he should insinuate that his son was not wholly free from blame; and that he had struck at the defendant before the pistol was discharged. The character of that young gentleman would have been safe if I had said nothing about it. You have seen with what caution and diffidence he has delivered his testimony; it appears that his mind was in a state of confusion, occasioned by the death of his friend, and that he does not even to this day pretend to have a perfect recollection of the order of time in which the facts took place: But admitting that the assault was made by the deceased before the defendant gave the mortal wound, you will have to enquire whether it was such an assault or such a battery as would justify the defendant in killing the deceased at that time, in such a place, and in that manner, with a formed intention, and with a deadly weapon.

My state of health and want of strength, seem to forbid my doing full justice to a cause of this magnitude. I will, however, endeavour to add something more. To do this, I return to the enquiry, whether it is of any consequence that the blow was given after or before the mortal wound. This brings us to another question—whether, if the assault was made before the discharge of the pistol, the killing in that manner, and with such a weapon, was excusable.

Was the defendant in such imminent danger of his life that he was obliged to slay the deceased as the only means of saving himself? The law on this point will be found in Foster's C. L. page 276—277 and 278.

"Two cases of self defence are supposed. In the one a forfeiture of goods was incurred, in the other not. What therefore is the true import of the words *self-defence upon chance-medley*, which the statute useth as description of that offence which did incur the forfeiture, homicide *per infortunium*, which hath been styled chance medley, cannot possibly be meant; for in that case the party killing is supposed to have no intention of hurt; whereas in the case the statute mentioneth, he is presumed to have an intention to kill or do some great bodily harm, at the time the death happened at least, but to have done it for the preservation of his own life. The word *chance-medley* therefore as it standeth in this statute connected with self-defence must be understood in the sense which *Coke* and *Kelyng*, in the passages already cited, say was the original import of it, a sudden casual affray commenced and carried on in heat of blood; and consequently *self-defence upon chance medley* must, as I apprehend, imply that the person when engaged in a sudden affray, quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then urged by mere necessity, killed his adversary for the preservation of his own life.

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"This case bordereth very nearly upon manslaughter and in fact and experience the boundaries are in some instances scarcely perceivable; but in consideration of law they have been fixt. In both cases it is supposed that passion hath kindled on each side, and blows have passed between the parties. But in the case of manslaughter it is either presumed that the combat on both sides hath continued to the time the mortal stroke was given or that the party giving such stroke was not at that time in imminent danger of death.

"He therefore, who in the case of a mutual conflict, would excuse himself upon the foot of self-defence, must show, that before a mortal stroke given, he had declined any farther combat, and retreated as far as he could with safety; and also that he killed his adversary through mere necessity and to avoid immediate death; if he faileth in either of these circumstances, he will incur the penalties of manslaughter."

In East's C. L. page 285, chap. v. sec. 54, treating on excusable self-defence in combat, and sec. 55, as to the existence of suc a necessity to kill as will be sufficient to excuse; and here h weakness, which has been so much dwelt on by his counsel, does not alter the law. The same point is treated of at length in 4 Blackstone, p. 199, 200, 201.

"Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart: *une disposition a faire une male chose:* and it may be either *express* or *implied* in law. Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberately duelling, where both parties meet avowedly with an intent to murder: Thinking it their duty as gentlemen, and claiming it as their right to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also: Yet it requires such a degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party which the world shall esteem equally reputable as that which is now given at the hazard of the life and fortune, as well of the person insulted as of him who hath given the insult. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet is guilty of murder by express malice; that is by an express evil design the genuine sense of *malitia*. As when a park-keeper tied a boy that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a school-master stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders,

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because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime who kills another in consequence of such a wilful act as shews him to be an enemy to all mankind in general, as going deliberately and with an intent to do mischiefs upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed; as to beat a man, to commit a riot, or rob a park, and one of them kills a man, it is murder in them all, because of the unlawful act, *the malitia præcogitata*, or evil intended beforehand."

"Also in many cases where no malice is expressed, the law will imply it; as where a man willfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved: And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. No affront by words, or gestures only, is sufficient provocation so to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked, had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise, and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder. In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants, endeavouring to conserve the peace; or any private person, endeavouring to suppress an affray or apprehend a felon, knowing his authority or intention with which he interposes, the law will imply malice and the killer shall be guilty of murder. And one intends to do another felony and undesignedly kills a man, this is also murder. Thus if one shoots at A and misses him, but kills B, this is murder, because of the previous felonious intent, which the laws transfer from the one to the other. The same is the case where one lays poison for A, and B against whom the poisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it. It were endless to go through all the cases of Homicide, which have been adjudged either expressly or impliedly malicious. These therefore may suffice as a specimen; and we may take it for a general rule that all Homicide is malicious, and of course amounts to murder unless where *justified*, by the command or permission of the law; *excused* on the account of accident or self preservation; or *alleviated* into manslaughter by being the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violently provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the Court and Jury, the latter of whom are to decide whether the circumstances alledged are proved to have actually existed; The former, how far they extend or take away or mitigate the guilt. For all Homicide is presumed to be malicious, until the contrary appeareth upon evidence."

Whatever may have been advanced by the counsel to the contrary, in this trial, yet by all the authorities it appears, that while a

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man may defend himself against a felonious attack, there is a difference in the law between a felonious and a simple assault, and that this difference is determined by the circumstances of each case: if a man is assaulted by another with his fist or a stick, not likely to kill, the other is not justified in employing a deadly weapon to kill the assailant. This runs through all the books, and it marks the intention of the person who employs such a weapon as being malicious. What were the facts in the rencontre between the defendant and the deceased? Supposing the former to have been attacked, was he likely to have been killed? You have seen the cane with which the deceased struck Selfridge—you know the place where the affray happened, and you have heard that it was done in the presence of numerous witnesses;—is it possible that under all the circumstances of this case, the defendant can be justified by the defence in preservation of his life, or of that of his person from any great bodily harm? Does it not absolutely appear to you in testimony, that the defendant went to the Exchange with a deadly weapon concealed in his pocket or behind him, and that he was assaulted by young Austin with a walking cane? I will not stop to enquire whether the defendant was lawfully on the Exchange, though an attempt has been made to prove to you that he was there by appointment, on his lawful occasions; they have produced Mr. Ingraham to shew that there was an appointment to meet at the Exchange; that the appointment was made on Sunday, 3d August, to meet the next day, in order to receive an execution which the defendant was to procure for Mr. Ingraham. This the jury will observe was an arrangement made by the defendant subsequent to his writing the advertisement against Austin, which appeared in Monday's paper, and from the publication of which the affray is supposed to have arisen, and which he intentionally provoked by that piece of abuse. Laying aside every suspicion which may arise from these circumstances, yet we must enquire, whether it was lawful for him to be there with a loaded pistol concealed in his pocket? Had he reason to apprehend, when he went on 'Change, that he was in iminent danger of his life? From the testimonies of Mr. Richardson and Cabot, it does appear that this danger could have been avoided by a more prudent mode of conduct. And was not his taking such measures full evidence of a heart void of social duty, and so fatally bent on mischief, as to be completely that kind of malice known in law under the description of malice aforethought? In the conversation he had with Cabot and Welsh, it was observed very cooly and deliberately that an attack would be made upon his person by some one employed by Mr. Austin. It does not appear, however, from the testimony, that this information was correct; and the words used in the conversations were varied by the imagination of the reporter, who is

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one of those witnesses ;—he went so far in his supposition, as to believe that a gentleman standing on the opposite side of the way with a whip in his hand was the person employed to chastise the defendant, and cautioned the defendant against it. Selfridge replied to him, with a nod and air of indifference, that he was prepared for the attack.

Now, Gentlemen of the Jury, under these circumstances, what would you do ? Would you conceal a weapon to kill your antagonist, as if you would act the assassin, or would you not say openly, I am not good at fisti-cuffs, neither have I learned the art of cudgelling, but if I am attacked and my life put in jeopardy, I carry openly in my hand a loaded pistol to defend myself against any felonious attack which may be attempted, if I cannot save myself without ?——Gentlemen, you would not have put a deadly, murderous weapon in your pocket to conceal it, until the voice of death should give utterance to a municipal right ;—circumstanced in this way, you would carry it openly in your hand, and by such manly, open conduct, would preserve yourselves from any assault. But if the defendant brought the assault upon himself, by his previous conduct, in the publication of an advertisement calling the father of the deceased a liar, scoundrel, and a coward ; if he has provoked a combat by such opprobious and abusive language, where are his grounds of defence ? From the conversation he had a few minutes before with Mr. Richardson and Cabot, it is apparent that he was determined on shooting any person who might assault him in any manner, however lightly, on the Exchange ; that he had prepared himself for that purpose ; and that he intended this, two days before, when he purchased the lead, or the shot, for casting the bullet. What is the law on this premeditation ?—clearly that the party was guilty of murder ;—that without such premeditation, if it was done on a sudden affray, the slayer is guilty of manslaughter. Will his feeble habit of body be a justification under this premeditation ? A man who is a cripple, and can walk only with a crutch, will be privileged to arm himself with a deadly weapon, in order to kill any man who may assault him ; he cannot be required to retreat to the wall, because his lameness prevents him from running ; the ground upon which he stands, or the crutch upon which he leans, is to him a wall, and he may shoot down his assailant :—thus the misfortune of decripitude throws a subject into a state of nature, and raises him above the control of, or dependence on, the laws of his country.

Ought not the defendant in this case to have made some attempt to retreat, or have called for help before he employed his deadly weapon in shooting the deceased ? It will not be pretended that the attack was made with a felonious intent, that Austin intended to rob him or to kill him, neither did the defendant understand it in

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that way; for he had said in the conversation with Cabot and Richardson, which I have already alluded to, that he was not good at fisti-cuffs or cudgelling, but had prepared himself in another way. By this it appears clearly that that the defendant expected to be attacked with a whip or a cane, and that he had determined to kill any one who assaulted him in that manner. Was not the language he had used in the scurrilous advertisement calling B. Austin a liar, a coward, and a scoundrel, such abuse as he might and did expect would be resented by a kicking or a caning? In this reasonable view of a situation he courted, how is it possible that the defendant could apprehend any other assault than a chastisement for his insolence, not an assault with a felonious intention? Even if the defendant had reason to fear a felonious attack, was there not such a want of caution, and such premeditation, such malice on a previous quarrel, as will deprive him of the excuse he would otherwise have had?

Shall we go into an examination of the right of one man to kill another for a simple assault? The counsel for the defendant have advanced this doctrine: the authorities they rely on are Grotius, Hawkins, and 4th Blackstone.

Where a man is unexpectedly assaulted and kills another with a weapon he has in his hand, and without time to reflect. these authorities do not infer malice from the nature of the instrument, but where a deadly weapon is prepared for the purpose the case is widely different. Whether it was prepared for the purpose, and whether it was worn as a part of dress, are prime considerations in all questions of this kind. We have much law on this point, in the trial of the *Soldiers* in this town for a homicide, which took place on March 5th, 1770, on the very place where Austin was killed. In *Wyer's* case and *Abbott's* case, more recently the distinction I now make were agreed to. In the trial of the soldiers it was agreed that their arms were legally in their hands, that they marched into the street in obedience of the orders of Capt. Preston, that they were sent to support and protect the sentry stationed at the door of the Custom House, and it was admitted by the Court, that if they had not been there in obedience of their Captain's order, they would have been guilty of murder, that the instruments they used, were lawful instruments of labor being such as by which they obtained their living. Had they laid down their guns, and taken up other weapons, such as axes, hatchets, spades or hammers, that would have brought the crime up to murder; it is true only two of them were convicted of manslaughter, but that arose from the particular circumstances of the case. Those men, at that time, were found guilty of manslaughter for doing that which was deemed to be their duty, and attempted to be justified by the repeated assaults made by the town's people, by throwing lumps of ice, brick bats, and other missives; and though in fact they did retreat to the wall, it was

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held to be manslaughter. Are the times so changed, and the laws so altered, that what was then held to be a felonious homicide, shall now be considered in this town without any extenuating circumstances justifiable homicide? has the distinction between Republicans and Federalists, overset our Constitution? is the one under the protection of the law and the other left to a simple state of nature for his protection?

I now come to a question which will fix the different shades of guilt on the various views of the fact; was the defendant in nothing to blame in this unfortunate and bloody catastrophe? Was he or was he not the provoker of this quarrel? If he was in anywise to blame in that respect, all the books concur, that he cannot avail himself of any circumstances, that may be set up in justification or excuse, under pretence of necessity. And is there nothing to show that he promoted this quarrel? What is the nature of the advertisement that he wrote and caused to be published? Did he not understand and expect in the morning of the publication, that it would provoke an assault, in consequence of which he unlawfully armed himself to be his own avenger. Before he put in this advertisement, could he not have informed Mr. Austin that he would defend himself as a Gentleman, why did he not write his advertisement in another manner? Could he not say that my reputation as a lawyer is of the first consequence to me, that Mr. Austin has represented that I solicited a law suit from the man who furnished the entertainment of the Republicans on the 4th of July, that I prevailed upon the man to bring the suit against the Republican committee, that I had convinced Mr. Austin that he was mistaken in the fact, and he promised me to contradict it, which he has hitherto neglected to do? Would not this statement have obtained the same credit with those that knew him? Where was the necessity of calling Mr. Austin a *liar*, *coward* and a *scoundrel*, admitting the mistake, why was it necessary to use the epithet *coward*, unless he meant to provoke him up to an act of violence, that he might have a pretext to kill him? That a combat of some kind was intended by the defendant is very apparent. Several of the witnesses have told you that they expected an attack by Mr. Austin upon Selfridge, as the inevitable consequence of that publication. Did he recollect, when he gave this challenge, the feebleness of his frame, or the weakness of his nerves and limbs? And why did he not add in order to put Mr. Austin upon his guard, I will not join with you in fisticuffs or cudgelling, but I carry a loaded pistol concealed in my pocket to kill any one who shall dare attempt to horse-whip or cane me? Is it not true that the advertisement was the origin of this quarrel? If he was to blame in provoking it, if he went out unlawfully armed with a deadly weapon concealed in his pocket expecting to be assaulted, and thereupon was

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assaulted, under a determined resolution to shoot the person who should assault him, and did actually kill the deceased the instant the assault was made, prusuant to a premeditated but concealed design; where is his ground of excuse or justification? If he has not made out to you beyond any reasonable doubt, that he was compelled to kill young Austin in his own defence it is your duty, and you are bound by your oath to return a verdict that he is guilty. If he is not guilty of manslaughter, he is guilty of nothing on this indictment; his being guilty of murder cannot excuse him on this issue.

Suppose the assault was not felonious but the person assaulted had some reason to suppose it so, is the person who is put upon his defence warranted in killing the assailant? it is a fixt principle in our laws that no man can be justified in killing another, but from unavoidable necessity to preserve his own life or property which may be feloniously attacked. In every affray, where there is no felonious intent, it is a fixt principle, that the person put upon his defence shall retreat as far as possible before he is justified in killing the assailant. A robber on the high way may be killed the instant he makes the assault, so may a burglar in the attempt to rob a house, so a woman may kill a man in the necessary defence of her chastity; but a woman knowing her chastity is to be assaulted, must not put herself in the way of the assailant and kill him, for in that case it will be considered, that she had premeditated the destruction of the man's life, and this would constitute the crime of murder; and in like manner, if another expects to be assaulted, he must not go in way of the assailant with an intention of killing by a concealed deadly weapon. Was such homicide to be allowed as lawful, where would it lead us? Duels might openly, and excusably be fought at noon day in the open street, in the bosom of the town.

Suppose a truckman to be taken by the nose, and with the butt of his whip he strikes the person who assaults him and kills him dead with the stroke, he is held guilty of manslaughter only, it is not excusable homicide, because the assault was not of that dangerous nature as to put his life in jeopardy. The instrument I have mentioned in this case is one belonging to his profession, and which he lawfully uses in pursuing his ordinary avocation. But suppose a truckman, imitating those gentlemen of nice honor, we have heard of, was to drive his truck about the streets armed with a sword by his side, and another truckman had run against his horses or his truck, the first had drawn his sword and killed the other with the thrust, this certainly would change the nature of the offence, instead of manslaughter it would be murder. Thus the degree of guilt resulting from the nature of the instrument is fully exemplified. A loaded pistol against a cane is equal to a sword against a truckman's whip. The truckman has nothing to do with the sword; the lawyer has no concern with this pistol.

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If a gentleman riding in his carriage should be run against by a hackney coachman, and he conceives that it was intended to injure his property in the carriage, or intended to kill his wife or children who may be with him, has he a right to fire his pistol and kill the hackney coachman on his box? This principle as contended for, by the counsel on the other side, if supported, will go a much greater length than they acknowledge. He is not only justified in killing the coachman upon the assault, but he may be justified upon the mere apprehension, and supposing that the hackney coachman intended to cross him and strike the wheels of his carriage, he may spring out, and with a sword, which is a gentlemanly weapon, run the coachman through the body, under a pretence of apparent necessity to save his wife or children. Shall I add any thing more, in order to expose these extravagant and novel ideas of the privilege of self defence?

If on every small misadventure, or trifling assault, a man has a right to lay another dead at his feet, what nice calculations we are under a necessity to be compelled to make! A man desirous of killing another should only go to a lawyer and inquire the degrees of assault that would bring down murder to manslaughter, and manslaughter to excusable or justifiable homicide. One man has a higher notion of honor than another; and the various notions of honor must be the graduated scale upon which a jury is to determine the true degrees of guilt on homicide. This cannot be the law of our country; yet some authorities have been read by the Defendant's counsel, to give it this colouring. I thought when they were read, they were but partially quoted. *Grotius* has been cited, to shew that the right of self defence is what nature has implanted in every creature, without any regard to the intention of the aggressors. I suspected that this general rule had some qualifications, and a little further on I find in the same author, that the danger to which the person is exposed, must be that of losing a limb, or a principle member of his body, or his life, and that there must be no possibility of avoiding the misfortune otherwise. These are the circumstances that authorise him, lawfully, and *instantly* to kill the aggressor. Further on he observes, that self defence may sometimes be omitted, that it is not lawful for a christian to murder a man for a box on the ear, or such other slight injury, or to avoid his running away. That murder in defence of our goods, is permitted by the law of nature, but even here, there must be an absolute necessity of killing the thief to save the goods.

But this treatise of Grotius on the rights of war and peace, explaining the laws and claims of nature and of nations, and the principles that relate either to the civil government or the conduct of private life, is a treatise that was written on what was the law among the Romans and other antient nations, particularly what is termed the civil law; he explains what is the law of nature, and

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he describes God as nature herself, and infers that men have all the rights in society which they possessed under the revealed will of their Creator, where the protecting laws of the government cannot be applied. In this case Selfridge had the whole state to protect him, even in a quarrel he provoked himself.

In 1 Hawkins, b. 1, chap. 30, sec. 1, it is held that homicide against the life of another, amounting to felony, is either with or without malice:

"That which is without malice, is called manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all."

The same author lays it down, that if he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon.

In 4 Blackstone, 184, it is laid down as a principle, that the person who kills another in his own defence, should have retired as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon the assailant. There is a distinction in the law between a combat and a sudden affray; a combat is when two men meet by agreement to fight. In the present case the defendant appears to be within the meaning of the word combat; for it appears he was told that there would be an assault, and to make it a combat he went armed with a loaded pistol. The same author proceeds to say, that the person shall not fictitiously appear to retire or to avoid the affray, in order to catch his opportunity of killing the assailant, but from a real tenderness of shedding his brother's blood. Apply this doctrine to the present case, and examine whether the evidence has shewn to you that the defendant entertained this tenderness in shedding the blood of young Austin. When he armed himself with a deadly weapon, and concealed it in his pocket, in order to shoot down any one who should assault him, can it be thought he had a tenderness against shedding human blood? When he declined having a recourse to the laws of his country for protection—when he chose to take vengeance into his own hands and perpetrated this act, can it be thought he had that tenderness which the law requires in him who shall unfortunately be driven from necessity to shed his brother's blood?

If the defendant had not written the advertisement, this quarrel would not have taken place—it was that which produced it. It appears that the consequences were produced exactly as he intended they should be, except that he killed one man instead of another. Retrace the whole of the transaction, and you will see the defendant bent on a bloody purpose: the letters of the 29th and 30th of July, appeared to have been intended to provoke a duel. But his counsel tell you that he was provoked to take these measures, on account of the injurious words spoken by B. Austin. Suppose it

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true that Mr. Austin had spoken disrespectfully of the defendant, or that he had printed the most opprobrious slander of him, would it justify the defendant's going armed with a loaded pistol concealed in his pocket? The law holds that words either spoken or written can never justify an assault; it is of no consequence, therefore, whether B. Austin was to blame or not, the defendant ought not to have defended himself in this way. It is true that the reputation of a lawyer is of great importance to himself, and of some to the community. As one of the profession, I wish the order was more respectable than the conduct of some of its members have lately rendered it; in that case we should not at this day have heard the outcry against them, which seems to prevail too much throughout the United States.

To me the original conversation which is said to have occasioned this unhappy event, does not appear necessarily to have involved the affront which the defendant seems to have conceived. From the testimony of Mr Scott, we find that some gentlemen had been joking Mr. Austin, at Russell's Insurance Office, on the Republican Committee being sued for the expence of the dinner the party had on Copp's hill; and that Mr. Austin, when he was going away, laughingly retorted, that if a federal lawyer had not interfered, it would not have happened; it was a reply upon the other party, and not a personal attack upon Mr. Selfridge. Mr. Scott inferred that he alluded to Mr. Selfridge, because he thought Mr. Austin addressed himself to him, as he was one of the federal party. Mr. Selfridge's reputation was not affected, but he pursues him with a dreadful vengeance, and throughout the whole appears to be determined to have him at his feet, alive or dead; how could he have suffered in his character or his business? Is there any federalist who thinks it dishonourable to sue a democrat? or is there any federalist who would decline to employ Selfridge on that account? For my part, I apprehend from what I have seen on the present trial, there was no ground for what is said to be the apprehension of the Defendant.

One further observation.—Mr. Carrol says that he heard the report of the pistol when he was at the post office; immediately after he saw Mr. Ritchie and Selfridge together, and Mr. Ritchie said to the Defendant, that he was extremely agitated; to which the Defendant replied, I am not agitated, I have done what I intended to do, or meant to do. Mr. Hastings says that he heard Selfridge speak also, when it was inquired who had done the deed, and say, I am the man, I am not agitated. Mr. Ritchie says that the Defendant said, I know what I have done, I am not so much agitated as you are; and that he stood firm, erect, and upright. Does this look as if the killing was done upon a sudden affray? would either of you Gentlemen, who should have been driving your carriage, and had the misfortune to run over a poor child begging alms in the street, and

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kill him; ſtop ſhort; and ſay, I am the man who has done it, I know what I have done, I am not agitated! I am totally unacquainted with human nature, even at this advanced period of life, if there is a man among you but who would ſhudder at the accident, and lament the effect of ſuch careleſſneſs. If any of you, in firing a gun, ſhould be ſo unfortunate as to kill one of your neighbours without intending it, your hearts would be too full, and you would be too much affected, to vaunt in a confident manner that you was the man that had done it; that you had done nothing more than what you intended. If the Defendant had killed young Auſtin by accident, he muſt have ſhown ſome degree of agitation; but he was cool and collected, and did no more than what he intended to do. This was true, or why did he carry with him a loaded piſtol? If there is in your opinion, any degree of premeditation, he muſt be at leaſt guilty of manſlaughter.

I have, I think, candidly examined this caſe, and have done only that which appeared to me to be my duty to do. I did expect that the indictment would have been for murder. It ought on every principle to have been ſo; there is no precedent to the contrary. The teſtimony I had heard, rendered ſuch an indictment proper; not that I wiſhed that he ſhould have been convicted of that offence, but becauſe I thought it would furniſh an opportunity for a full examination of the unfortunate event. The Grand Jury having found a bill for manſlaughter only, have, in ſome meaſure, reſtrained us from ſuch an inquiry, and the opportunity we might have had of conducting the trial before a full bench of the Supreme Court. I have no doubt but what his Honor, the judge who preſides, will give you correct directions in his charge; but ſtill it is not the charge of a full bench, and therefore cannot be ſo ſatisfactory, as it might have been. I ought to have no expectation either that a wrong verdict will be given, or that the verdict, be it what it may, will throw the community into convulſions. Fear of conſequences is an inadmiſſible principle in our judicial proceedings; higher motives muſt urge us to our duty, and the baſe principle of fear, can have no effect in the trial.

If the Defendant has ſuffered, or muſt ſuffer, is it not the conſequence of his own fault? And is it not right that one who avowedly raiſes himſelf above the laws, ſhould ſuffer, rather than that the eſſential laws of ſociety, the firſt law of natural reaſon, and the law of God, promulgated by the higheſt ſanctions, ſhall be ſet at defiance?

Gentlemen, I conſign this cauſe to you; to be decided according to the laws of our country, which laws his Honor will ſtate to you from the bench; you will decide as in the preſence of Him who knows all our motives, and before whom we muſt all ſoon appear and have to anſwer, and in the preſence of the whole human race, for the motives on which the preſent deciſion ſhall be formed.

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PARKER. J.

Gentlemen of the Jury! As this most interesting trial has already occupied four days—And as you must by this time be nearly exhausted, I shall endeavour, in discharging the duty incumbent on me, to consume as little more of your time as may be consistent with a clear exposition of the principles necessary to be understood, in order to form a just and legal decision. You have heard the important facts in the case, minutely and distinctly stated by the witnesses, ably and ingeniously commented upon by counsel, and the principles of law elaborately discussed and illustrated in as forcible and eloquent arguments as were ever witnessed in any court of justice in our country. It is now left to you upon the whole view of the case, both of the law as it shall be declared to you by the court, and the facts as proved by the testimony, to pronounce a verdict between the defendant and your country.

That in so important a trial, it should have devolved upon me, alone, to preside over its forms, as well as to declare the principles upon which your decision is to rest, is by no means a subject of congratulation. It is a situation which of all others I should have avoided, had not official duty imperiously imposed it upon me. But the organization of the court, and distribution of the services of its members are such as to have rendered any other arrangement difficult, if not impossible. Under our present judiciary establishment, all criminal causes, other than capital, are triable before one judge; and this system has proved itself to be eminently calculated for the dispatch of public business; other provisions in the system ensure as great a degree of correctness as can be expected of any human institution.

It is true that although at a term holden by one judge, if others are present, they may proceed together: But at this time, the court being in session in three, if not four several counties, it was impracticable, had it been desirable, to have more than two judges engaged in the present trial. The great delay which would have taken place, in consequence of a division of opinion (a case not unlikely to happen in the course of any trial) between two judges, rendered it altogether inexpedient that more than one should attend; and as this term had been previously assigned to me, the unpleasant task of officiating in the present case, seemed unavoidably to belong to me.

Since it has thus fallen to me to execute a painful and anxious duty, I shall not shrink from the task of declaring to you the principles of law by which you are to be governed in your investigation and decision of this case. If in doing this, I should be found capable, in order to retain the favour of one class of the community, or to court that of another, of abusing my office by

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stating that to be law which I know to be otherwise; this is the last time I should be suffered to sit upon this bench, and I ought to meet the execration and contempt of the society to which I belong.

The crime charged by the Grand Jury upon the defendant is manslaughter; a crime of high consideration in the eye of the law. This crime, however, is not defined by our statute, but its punishment is by it provided for.

In order therefore, to ascertain the nature and character of the crime, it is necessary to resort to the books of the common law, the principles of which, by the constitution of our government, are made the law of our land, until they shall be changed or repealed, by our own legislature.

The counsel for the government, as well as for the defendant, have therefore wisely and properly searched the most approved authorities of the common law, for the principles upon which the prosecution or the defence must be supported. It is from those books alone, that any clear ideas of the offence which is in trial, or the defence which has been set up, can be attained.

The crime of manslaughter, according to those authorities, consists in the unlawful and wilful killing of a reasonable being, without malice express or implied, and without any justification or excuse.

That the killing of a human being, under some circumstances, is not only excusable, but justifiable, is proved by the very terms of this definition.

Some persons, however, have affected to entertain the visionary notion, that it is in no instance lawful to destroy the life of another, grounding their opinion upon the general proposition in the Mosaic code, that "whosoever sheddeth man's blood, by man shall his blood be shed." There is always danger in taking general propositions as the rules of faith or action, without attending to those exceptions, which if not expressly declared, necessarily grow out of the subject matter of the proposition.

Were the position above alluded to, true, in the extent contended for by some; then the judge who sits in the trial of a capital offence, the jury who may convict, the magistrate who shall order execution, and the sheriff who shall execute, will all fall within this general denunciation, as by their instrumentality the blood of man has been shed.

The same observations may be applied to one of the precepts in the decalogue. Thou shalt not kill, is the mandate of God himself. Should this be construed literally and strictly, then a man who, attacked by a robber, or in defence of the chastity of his wife, or of his habitation from the midnight invader, should kill the assailant, would offend against the divine command, and be

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obnoxious to punishment. But the common understanding of mankind will readily perceive that the very nature of man, and principles of self-preservation, will supply exceptions to these general denunciations.

Our laws, like those of all other civilized countries, abundantly negative such unqualified definitions of crime, and have adopted certain principles by which the same act may be ascertained to be more or less criminal or entirely innocent, according to the motive and intent of the party committing it.

Thus when the killing is the effect of particular malice or general depravity, it is murder and punished with death.

When without malice, but caused by sudden passion and heat of blood, it is manslaughter.

When in defence of life it is excusable.

When in advancement of public justice, in obedience to the laws of the government, it is justifiable.

These principles are all sanctioned by law and morality, and yet they all contradict the dogma, that "whosoever sheddeth man's blood, by man shall his blood be shed."

It is not necessary for you to run a nice distinction between justifiable and excusable homicide; if the one now in trial be either the one or the other, it is sufficient for te purpose of the defendant.

A distinction existed in England, which does not exist here, *there* the man who had committed an excusable homicide forfeited his goods and chattels; while he who had a justification, forfeited nothing. Here, whether the homicide be justifiable or excusable, there must be an entire acquittal.

Numerous authorities, ancient and modern, have been read to you upon this subject. Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrasments, there being in some instances an *apparent* though in none a *real* incongruity. But I apprehend you need not trouble yourselves with the books out of court, for I think I shall be able to state all t he principles you will have occasion to consider; there being in fact no disagreement about them from the time of Sir Edward Coke, one of the earliest sages of the law, down to Sir William Blackstone, one of its brightest ornaments. These same principles, although taken from English books, have been immemorially discussed, and practised upon by our lawyers, adopted and enforced by our courts and juries, and recognized by our legislature. To prove this, I now need say no more, than that the same learned judge Trowbridge, who was quoted by the Attorney General, in his charge to the jury in the trial of the soldiers for the massacre in 1770, laid down, discussed and illus-

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trated with great precision and clearness, every principle which can come in question in the present trial.

These principles I will endeavour to simplify for your consideration.

First. A man, who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm; may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm—such as retreating as far as he can, or disabling his adversary without killing him if it be in his power.

Secondly. When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

Thirdly. When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Of these three propositions, the last is the only one which will be contested any where; and this will not be doubted by any who are conversant in the principles of criminal law. Indeed, if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case. A. in the peaceable pursuit of his affairs, sees B. rushing rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough, in the same attitude; A. who has a club in his hand, strikes B. over the head before, or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with *powder only*, and that the real design of B. was only to *terrify* A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine, must require, that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol is loaded. A doctrine which would entirely take away the essential right of self defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.

These are the principles of law, gentlemen, to which I call your attention. Having done this, I might leave the cause with you, were it not necessary, to take a brief view of some other parts of it.

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As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere, with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge, into that of an advocate. All which I conceive necessary or proper for me to do, in this part of the cause, is to call your attention to the points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and the law can be clearly discriminated; I should always wish the jury to leave the stand without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced, to weigh the testimony and settle the merits of the case.

An important rule in the present trial is, that on a charge for murder or manslaughter, the killing being confessed, or proved, the law presumes that the crime as charged in the indictment, has been committed, unless it should appear by the evidence for the prosecutor, or be shewn by the defendant on trial, that the killing was under such circumstances as entitle him to justification or excuse.

On the point of killing, there is no doubt in this case. The young man named in the indictment, unquestionably came to his death, by means of the discharge of a pistol by the defendant at the bar. This part is confessed as well as proved.

The great question in the case is, whether according to the facts shewn to you on the part of the prosecution, or by the defendant, any reasonable, legal justification or excuse has been proved—Whether the killing were malicious or not, is no farther a subejct of inquiry than that if you have evidence of malice, although the crime charged does not imply malice, it may be considered as proving this crime, because it effectually disproves the only defence which can be set up, after a killing is established.

From the testimony of several witnesses examined by the Solicitor and Attorney Generals, it appears that on the day set forth in the indictment, the defendant was in his office a little before one o'clock—that in a conversation about his quarrel with the father of the deceased, he intimated that he had been informed an attack upon him was intended, and that he was prepared.—That

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a short time afterwards, he went down from his office, which is in the Old State House, crossing State-street diagonally, tending towards the United States Bank. That as he passed down his hands were behind him, outside of his coat, without any thing in them, is proved by the testimony of Mr. Brooks, who saw him pass down, and by that of young Mr. Erving, who saw him when the deceased approached, put his right hand in his pocket, and take out his pistol, while his left arm was raised to protect his head from an impending blow.

The manner of his going down upon 'Change, the weapon which he had with him, the previous intimation of an attack which he seems to have received, from Mr. Cabot or Mr. Welsh, and the errand upon which he went down as stated by Mr. Ingraham, are all circumstances worthy of your deliberate attention.

Passing down State-street, as before described, several witnesses testify that the deceased, who was standing with a cane in his hand, near the corner of the Suffolk buildings; having cast his eye upon the defendant, shifted his cane into his right hand, stepped quick from the side walk on to the pavement, advanced upon the defendant, with his arm uplifted; that the defendant turned, stepped one foot back, and that a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterwards given and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who becoming exhausted, fell down, and in a few minutes expired.

This is the general course of the testimony; the scene was a shocking one, and all the witnesses state to you that they were exceedingly agitated. This will account for the relation given by Mr. Lane and one other witness, I believe Mr. Howe, who state the facts so differently from all the other witnesses produced by government, as well as by defendant, that however honest we may think them, it is impossible not to suppose they are mistaken.—Indeed, the Attorney General has wisely and candidly laid their testimony so far as it differs from that of the other witnesses, out of the case.

There is one witness, Mr. Glover, who states the transactions somewhat differently from the other witnesses. He says, that having expected to see a quarrel upon Exchange, in consequence of the publication against the deceased's father, in the morning, he went there for the express purpose of seeing what should pass—that he saw Mr. Selfridge coming down street, saw young Austin advance upon him, that he had a full view of both parties, was within fifteen feet of them, that he saw a blow fall upon the head of Selfridge with violence, the arm of the deceased raised to give

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a second blow, which fell the instant the pistol was discharged. This is the only witness who swears to a blow before the discharge of the pistol; but he swears positively, and says he has a clear, distinct recollection of the fact; his character is left without impeachment. If you consider it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances proved by other witnesses which may corroborate or weaken the testimony of Mr. Glover.

On this point you will attend to the testimony of Mr. Wiggin, who swears that he heard a blow as if on the clothes of some person, that he turned, and saw the deceased's arm uplifted, and another blow and the discharge of the pistol were together.

You will consider the testimony of young Erving, who swears that the left arm of the defendant was over his forehead, as though defending himself from blows, when he saw the blow fall. You will consider that all the witnesses but Glover, state, that the blow which they saw, and thought the first, was a long blow across the head, that the blow, which Glover says was the first, was a direct, perpendicular blow, and that he then saw the second blow, which was a cross one, as testified by the other witnesses.

If you find a difficulty in settling the fact of the priority of the blow, take this for your rule, that a witness who swears positively to the existence of a fact, if of good character, and sufficient intelligence, may be believed, although twenty witnesses, of equally good character, swear that they were present, and did not see the same fact. The confusion and horror of the scene was such, that it was easy for the best and most intelligent of men, to be mistaken, as to the order of blows, which followed each other in such rapid succession, that the eye could scarcely discern an interval. You will, therefore, compare the testimony of the witnesses, where it appears to vary, attending to their different situation, power of seeing, and capacity of recollecting and relating, and settle this fact according to your best judgment, never believing a witness who swears positively, to be perjured, unless you are irresistibly driven to such a conclusion. Upon this point you will also attend to the testimony of Mr. Fales, and of Mr. Osborne, and Mr. Perkins Nichols, touching the testimony of Mr. Fales.

The counsel for the defendant seem, however, to deem it of little importance to ascertain whether the blow was given before the pistol was discharged or not, as there is evidence from all the witnesses, that an *assault*, at least, was made by the deceased, before the pistol was fired. I think differently from them upon this point. When the defence is, that the assault was so violent and fierce that the defendant could not retreat, but was obliged to kill the deceased, to save himself, it surely is of importance to ascer-

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tain whether the violent blow he received on his forehead, which at the same time that it would put him off his guard, would satisfy him of the design of the assailant, was struck before he fired or not.

I doubt whether self defence could in any case be set up, where the killing happened in consequence of an assault *only*, unless the assault be made with a weapon which if used at all, would probably produce death.

When a weapon of another sort is used, it seems to me that the effect produced, is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self defence.

But whether the firing of the pistol was before or after a blow struck by the deceased, there is another point of more importance for you to settle, and about which you must make up your minds, from all the circumstances proved in the case; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigour of the defendant and his power to resist or to fly. The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the *real stress* of the case. If you believe under all the circumstances, the defendant could have escaped his adversary's vengeance, at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted.

If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him, as will deprive him of the privilege of setting up a defence of this nature. It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honour and natural right, by which the killing may be justified.

These are principles which you as jurors, and I as a judge cannot recognize. The laws which we are sworn to administer, are not founded upon *them*.

Let those who chuse such principles for their guidance, erect a court for the trial of points and principles of honour; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except kill-

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ing his adversary, were in his power—he has been guilty of manslaughter, notwithstanding you may believe with the grand jury who found the bill, that the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

I ought not to rest here; for although I have stated to you that when a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may from the existence of other circumstances proved against him, forfeit his right to a defence which the laws of God and man would otherwise have given them.

If a man, for the purpose of bringing another into a quarrel, provokes him so that an affray is commenced, and the person causing the quarrel is overmatched and to save himself from apparent danger kill his adversary, he would be guilty of manslaughter, if not of murder, because the necessity being of his own creating, shall not operate in his excuse.

You are therefore to inquire whether this assault upon the defendant by the deceased, was or was not by the procurement of the defendant; if it were, he cannot avail himself of the defence, now set up by him. And here you are called upon to distinguish pretty nicely, and to attend to a part of the case which I thought was going too far back to have an influence upon this trial, but which the urgency of the Attorney General and the consent of defendant's counsel finally induced me to admit.

You have heard the whole story of the misunderstanding between the defendant and the father of the deceased—who was originally in the wrong, it is not for me to say, but I feel constrained to say, that whatever provocation the defendant may have conceived to have been given him, and however great the injury which the deceased's father may have done him, he certainly proceeded a step too far in making the publication which appeared in the paper which came out on the morning of this unhappy disaster.

To call a man coward, liar and scoundrel, in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever Such a publication is libellous in its very nature, as it necessarily excites to revenge and ill blood. Indeed, I believe a court of honour, if such existed, to settle disputes of this nature, would not justify such a proclamation as the one alluded to. A posting upon 'change or in some public place, we have heard of, but I never before saw such a violent denunciation as this in a public newspaper.

Neither can I refrain from censuring the managers of the paper who admitted such a publication, for so readily receiving and publishing, what in its very nature would tend to distrub the public

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peace. But, gentlemen, it is one thing for a man to have done wrong, and another thing for that wrong to be of a nature to justify an attack upon his person. If personal wrong, done by the father of the deceased to the defendant, would not justify him in publishing a libel; neither would the libel have justified the deceased or his father in attacking the person of the author of the libel.

No man can take vengeance into his own hands, he can use violence only in defence of his person. No words, however aggravating, no libel, however scandalous, will authorize the suffering party to revenge himself by blows.

If therefore, Mr. Austin himself, the object of the newspaper publication, would not be justified had he attacked the defendant and beat him with a cane; still less would the circumstances have justified the unfortunate young man, who fell a victim to the most unhappy and ever to be lamented dispute.

For however a young and ardent son may find advocates in every generous breast, for espousing his father's quarrel, from motives of filial affection, and just family pride; yet the same laws which govern the other parts of the case, would have pronounced him guilty, had he lived to answer for the attack which was the cause of his death.

The laws allow a son to aid his father if beaten, and to protect him from a threatened felony, or personal mischief, and in like cases a father may assist a son, and should a killing in either case take place it is excusable; but neither one nor the other can justify resorting to force, to avenge an injury consisting in words however opprobrious, or writings however defamatory.

You will therefore consider, whether these facts, antecedent to the meeting on 'Change, can have much operation in the cause, let which party will, be found by you to be in the wrong.

Upon the whole, therefore, of these circumstances, should you be of opinion that the defendant, in order to avenge himself upon the father of the deceased, prepared himself with the deadly weapon which he afterwards used, went upon 'Change with a view to meet his adversary, and expose himself to an attack, in order that he might take advantage of and kill him, intending to resort to no other means of defence in case he should be overpowered; there is no doubt the killing amounted to manslaughter—but if from the evidence in the case, you should believe that the defendant had no other view but to defend his life and person from an attack which he expected, without knowing from whom it was to come—that he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise, than by the death of the assailant—then the killing was excusable, provided

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the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent. Of all this you are to judge and determine, having regard to the testimony of the several witnesses who have given evidence to these several points in the defence.

The principles which I have thus stated are recognized by all the books which have been read, and are founded in the natural and civil rights, and in the social duties of man.

The last subject on which I shall trouble you, is the address which has been so forcibly urged upon your minds by the counsel on one side, and as zealously and ably commented on by the Attorney General on the other, touching the necessity of excluding all prejudices and prepossessions relative to this cause. I do not apprehend these observations were in any degree necessary, as I cannot bring my mind to fear that the verdict of twelve upright, intelligent jurors, selected by lot from the mass of their fellow-citizens, will be founded on any thing beside the law and evidence applicable to the case.

Every person of this numerous assembly, let his own opinion of the merits of the cause be as it may, must be satisfied of the fairness, regularity, and impartiality of the trial, up to the present period; and sure I am, that nothing which is left to be done by you, will impair the general character of the trial. If you discharge your duty conscientiously, as I have no doubt you will, whether your verdict be popular or unpopular, you may defy the censure, as I know you would disregard the applause of the surrounding multitude.

Least of all do I apprehend that party spirit will come in to influence your opinions.

However the storms of party rage may beat *without* these walls, I do not believe the time has yet come when they shall find their way *within*. Nor do I believe that a general apprehension is entertained, that a man accused of a crime is to be saved or destroyed according to political notions he entertains. If ever the time should come when a general belief shall be entertained that trials are conducted and judgments given with a view to the political character of the parties interested; vain and ineffectual will be the forms of your constitution, and useless the attempt to administer the laws. A general resistance would be the consequence, and if this belief should be founded in fact and in truth; that resistance would, in my apprehension, be perfectly justifiable, for no people would be bound to respect the *forms* of justice, when the substance shall have vanished; when the fountains of justice shall be manifestly corrupt and the forms and parade adhered to for the purpose of imposing on the citizens and subjecting them to oppression under the garb of law.

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You, Gentlemen, will not be the first to violate the solemn oath you have taken, and seek for a conviction or an acquittal of the defendant upon any other principles than those which that oath has sanctioned. And as I trust, that in performing *my* duty, I have conscientiously regarded that oath which obliges me "faithfully and impartially to administer the laws according to my best skill and judgment," so that in discharging yours, you will have due regard to that which imposes upon you the obligation well and truly to try the cause between the Commonwealth and the defendant, according to law and the evidence which has been given you.

VERDICT.....NOT GUILTY.

Counsellors for the Defendant.

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HON. CHRISTOPHER GORE,
HON. HARRISON G. OTIS,
CHARLES JACKSON, ESQ.

For the Prosecution.

SOLICITOR & ATTORNEY GENERALS.

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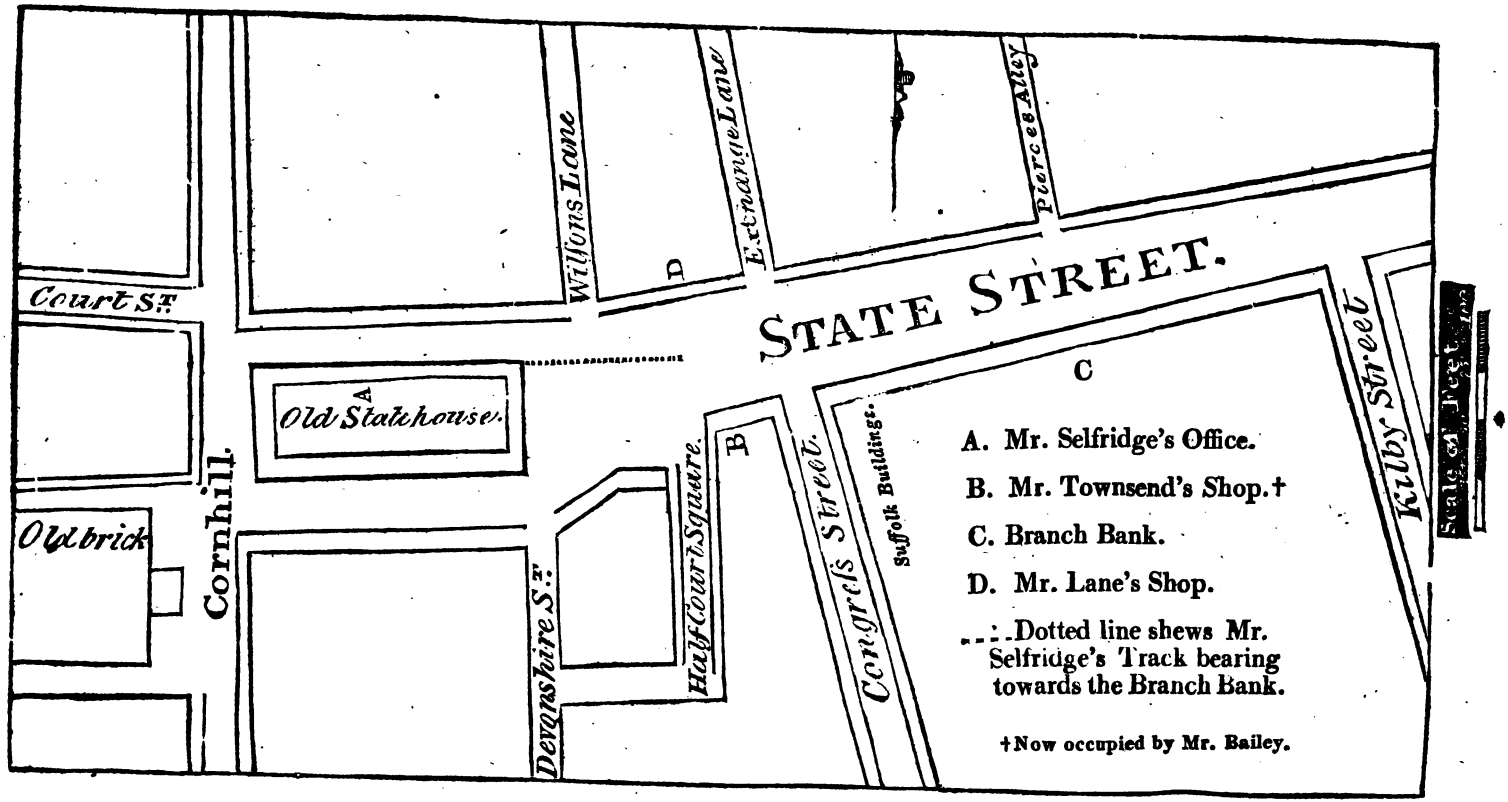

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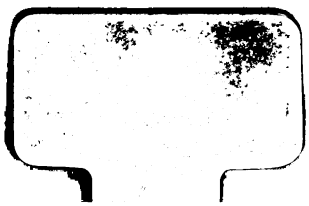

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